THE INCOME TAX REPORTS

A JOURNAL OF THE LAW OF INCOME TAX

WITH

REPORTS OF

INDIAN AND SELECT ENGLISH CASES.

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NOTES & COMMENTS.

A Fundamental Notion Underlying Indian Income Tax.

Under Section 3 of the Indian Income Tax Act, 1922, 'where any Act of the Indian Legislature enacts that income tax shall be charged for any year at any rate or rates applicable to the total income of the assessee, tax at that rate or those rates shall be charged for that year in accordance with the Income Tax Act in respect of all income, profits and gains of the previous year.' Is the tax charged for a particular year under this section a tax on the profits of that year, the income of the previous year being merely treated as a measure of those unascertained profits, or is it a tax on the income received in the previous year? This question assumes great importance when businesses are discontinued. If the taxpayer was charged in advance he would be entitled to a refund. Under the English Law it is clear that assessment is made in respect of the unascertained income of the year in which the taxpayer is charged and not on the income received by him in the pervious year. In *Behari Lal Mullick, In re* [(1927) 54 Cal. 630] the High Court of Calcutta held that the Income Tax Act of 1922 has introduced a definite change in the system and that under this Act an assessee is taxed in the year of assessment upon the income received by him in the previous year. The question was recently raised before the Judicial Committee in *Commissioner of Income Tax, U. P.* v. *Tehri-Gharwal State* (1934 Inc. Tax Rep. 1). It was contended in this case on behalf of the Commissioner that the intention of Section 3 of the Act of 1922 was not to treat the income of the previous year merely as a measure of the unascertained income of the year of assessment but to tax the assessee in the year of assessment upon the income received by him in the previous year. Referring to this contention their

Lordships said as follows: "Their Lordships think that there is much force in these contentions and if the question they had to decide on the present appeal were merely as to the true meaning of Section 3 of the Act of 1922 they might be prepared to endorse the view of the Calcutta High Court." Though the case was ultimately decided on another ground, there is in this case an expression of the opinion of the Judicial Committee on this important question.

English Companies : Relief in Respect of Indian Income Tax.

In *Assam Railway Trading Co.* v. *Inland Revenue Commissioners* (1934 Comp. Cas. 9; 102 L. J. K. B. 702) a question of considerable importance affecting English Companies doing business in India was decided by the Court of Appeal of England.

An English Company controlled by a Board in England owned a railway and also carried on trade in India. Their profits were entirely derived from their business in India. They earned profits in India amounting to £ 186,808 in a particular year. The Indian income tax authorities deducted from this amount the interest which the Company had to pay on debentures, amounting to £ 42,500 odd and taxed the Company on £ 129,365. Under the English Acts the Company had no right in determining their profits for purposes of the United Kingdom tax to deduct the interest on debenture debts from the assessable profits. Section 27 of the English Finance Act entitled the Company to relief from the United Kingdom tax in respect of that part of their income on which tax had been paid in India, and the question arose whether they were entitled to relief in respect of the whole of their profits, namely, £ 186,808, or only in respect of the income on which they had been taxed in India, namely, £ 129,365. It was contended on behalf of the Company that as the whole of their income had been reviewed for payment of income tax in India and the same profits were under review in England the Company were entitled to relief in respect of the whole of their profits. The Court of Appeal of England held confirming the decision of *Finlay, J.*, that relief could only be granted in respect of £ 129,365 on which tax had been paid in India. Their Lordships held that to claim relief under Section 27 the tax-payer has to show that on a part of the income

which is his statutory income in the United Kingdom he has paid Dominion income tax. The revenue authorities of the United Kingdom cannot re-open or re-adjust the figures in each country. They have to deal with the results which have been attained by following the legislative directions in each country. They cannot scrutinise the abatement or deductions that have been allowed by a comparison with a different system in the other part of the Commonwealth. The basic condition of relief under Section 27 is that if a person has paid tax on his income in the United Kingdom and if some part of that income so charged and assessed to tax can be identified and proved to have paid Dominion tax, that part which has suffered dual taxation can be relieved.

Time-barred Debts, Whether Bad Debts.

The Privy Council laid down in *Commissioner of Income Tax, C. P. and Berar* v. *Sir M. Chitnavis* [(1932) 59 I.A. 290; (1932) Comp. Cas. 464] that 'the mere fact that a debt was incurred at a date beyond the period of limitation will not of itself make the debt a bad debt. Still less will it fix the date at which it became a bad debt. A statute barred debt is not necessarily bad, nor is a debt which is not statute barred necessarily good, though the age of the debt is a relevant matter to take into consideration.' The course to be adopted when the only evidence is that the debt became time-barred in a particular year and there are no other circumstances to show when the debt became bad and irrecoverable, was considered by the Patna High Court recently in *Bansidhar Poddar* v. *Commissioner of Income Tax, Bihar and Orissa* (1934 Inc. Tax Rep. 20). A debt was kept alive for several years by acknowledgments. It became time-barred in a particular year and the assessee claimed deduction of the debt in that year as a bad debt. There was no finding of any fact to show when the debt became bad and irrecoverable other than the finding that it became time-barred in the year of account. The High Court held that under the circumstances the assessee was entitled to deduction of the amount of the debt from the income of the year of account. Referring to the practice of income-tax authorities to regard a debt as bad *prima facie* when it is barred by limitation and is no longer recoverable, their Lordships say that this practice is not an unreasonable

one, though, of course, 'the presumption is rebuttable by evidence according to the circumstances of the case.' Whether it is correct to say that there is a 'presumption' in such cases in the strict legal sense of the word or not, this decision, we think, lays down a safe working rule where there is no evidence to show when a debt became bad other than that it became time-barred in a particular year.

Re-Assessment Proceedings : Limitation for Initiation of Proceedings.

When income has escaped assessment in any year the Income Tax Officer may at any time within one year or the end of that year serve on the person liable a notice and proceed to assess or re-assess such income. (*Vide* Section 34, Income Tax Act). Where *A* is taxed on the joint income of *A* and *B* and subsequently it is found that *B* ought to have been assessed separately, can it be said that *B*'s income had 'escaped assessment' and if so, are the income tax authorities entitled to serve a notice under Section 34 on *B* within one year from the date on which the joint assessment was found to be illegal? Are they not bound to issue a notice to *B* within the year during which proceedings for assessment in respect of the income should normally have been initiated? These two questions were considered by the Calcutta High Court recently in *In the matter of Messrs. Burn & Co.*, (1934 Inc. Tax Rep. 30). Their Lordships held first, that under such circumstances the income could not be said to have escaped assessment and secondly, that the expression 'in any year' in Section 34 must be read as meaning the year during which proceedings in assessment in respect of that very year should have been initiated. Where an assessment made in respect of the income of the years 1928-29 and 1929-30 was cancelled on March 30, 1931, and notice under Section 34 for re-assessment was issued on March 31, 1931, it was held that the notice, so far as it related to the income of 1928-29 was time-barred and so invalid. The facts of the case are somewhat complicated and the decision on the first question may be said to rest more or less on all the facts of the case but on the second question the decision lays down a principle of general importance.

It may be noted in this connection that in the judgment pronounced recently by the Judicial Committee in the matter of

the assessment of Messrs. Burn & Co., for the year 1927-28 their Lordships have made the following observation: "It may be that in the two cases to which the section (*i.e.*, section 34) applies, if no notice is served within the year following the tax year, no subsequent assessment or re-assessment can be made of the income which has escaped assessment or has been assessed too low." The judgment in this case, *Rajendranath* v. *Commissioner of Income-tax* in which another question of very great importance has been decided by the Judicial Committee will be fully reported in our next issue.

Casual and Non-recurring Receipt.

The difference between profits of a business and a receipt of a casual and non-recurring nature is well illustrated by the case of *Commissioner of Income-tax, Burma* v. *J. I. Milne* (1934 Inc. Tax Rep. 25) decided by Page, C.J., Das, J., and Mya Bu, J. In consideration of a sum of Rs. 10,000 which the assessee advanced to a mining engineer for working certain mines the latter agreed to pay the assessee, in the event of the mines being sold, a sum equal to one-third of the sale proceeds. The mines were sold and the assessee received £ 6,000 under this agreement. The income tax authorities sought to assess him on this amount on the ground that the assessee carried on the business of buying and selling mines and that the transaction was in effect a purchase of a one-third share in the mines. On a reference by the Commissioner the High Court of Rangoon held that, quite apart from the question whether there were materials upon which the Commissioner could find that the assessee carried on the business of dealing in mining concessions, upon the face of the agreement it was clear that the transaction in question did not form part of any business carried on by the assessee. The assessee acquired no right whatever in the property. It was a receipt of a casual and non-recurring nature, not arising from a business, and came within the exemption stated in Clause (vii) of sub-section 3 of Section 4 of the Indian Income-tax Act.

Reference: Nature of Deposit Made by Assessee.

A question relating to procedure in Income-tax References was also decided in the above-said case, namely, that the fee of Rs. 100, which must accompany an application for a reference

by the Commissioner under Section 66 (2) of the Income-tax Act forms part of the costs of and incidental to the reference which the Court in its discretion may award, in a proper case, to the assessee. The practice in Burma seems to have been different and Page, C. J., thought that this practice was not unreasonable, but as the High Courts of Madras, Lahore, Patna and Allahabad has held otherwise and as the matter was one of procedure their Lordships were not prepared to differ from these Courts.

Priority of Income-tax Debts.

The question whether the Crown is entitled to priority in respect of income-tax debts and whether the Court has power, where there are funds of the tax-payer in Court, to direct payment of income-tax debts due to the Crown on the application of the Commissioner without formal attachment, was the subject of consideration in *Soniram Rameshwar* v. *Mary Pinto* (to be reported shortly). A receiver was appointed in a mortgage suit to collect the rents and the Commissioner of Income-tax applied to the Court for an order directing the receiver to pay, out of the rents collected by him, a certain sum of money which the mortgagor had to pay to the Crown on account of income-tax. After a review of the authorities on the subject Leach, J., held that the Crown was entitled to priority in respect of all Crown debts as against unsecured creditors and that when there are funds in Court out of which the payment can be made, the Court has power to order payment without prior attachment by the Crown, after giving notice to the interested parties. The question whether the Crown has a right of preference in respect of such debts against secured creditors was left open by his Lordship as it did not arise for decision in the case. Incidentally it may be noted, that it is assumed in this case that a mortgagee is in the position of an unsecured creditor in respect of the rents and profits of the mortgaged property.

NOTES AND COMMENTS

Judicial Committee on Time Limit for Assessment.

In *Commissioner of Income Tax, Bengal* v. *Tehri-Gharwal State* (1934 Inc. Tax Rep. 1) the Judicial Committee expressed their opinion on an important principle underlying Indian income-tax law, namely, that the tax charged for a particular year under the Indian Income Tax Act is a tax on the income of the previous year and not a tax on the income of the year of assessment. The Committee have pronounced their opinion recently on two other points of general importance. In *Sir Rajendranath* v. *Commissioner of Income Tax, Bengal* (1934 Inc. Tax Rep. 71) it was argued before the Board that under the Indian income-tax law an assessment cannot be made after the expiry of the tax year. Though there is no express provision in the Income Tax Act to that effect, it was argued that Section 34 of the Act which provided that in the two cases there mentioned, namely, where income has escaped assessment or has been assessed too low, proceedings for re-assessment may be initiated during the next succeeding year necessarily implied that assessment cannot be made after the expiry of the tax year in other cases. Their Lordships overruled this argument and held that there is no provision in the Indian Act prohibiting an assessment after the expiry of the tax year. Section 34 only means that where income has escaped assessment or has been assessed too low, fresh assessment cannot be made unless notice of re-assessment is issued within the succeeding year. If there are pending at the time proceedings for the assessment of the assessee which have not yet terminated in the final assessment thereof, income has not escaped assessment and the case does not fall within the purview of Section 34, and as there is no time limit prescribed or necessarily implied in the Act, assessment may be made after the expiry of the tax year.

Though the theory of pendency of proceedings is no doubt sound, the practical application of the rule bristles with difficulties. The question whether proceedings are pending is itself a very difficult one and the doctrine of continuation of proceedings and revival of proceedings which have been 'struck off' with which we are familiar in the law relating to limitation of proceedings for execution of decrees may soon have to be imported.

The observation of their Lordships that "income which has already been duly returned for assessment cannot be said to have 'escaped' assessment within the statutory meaning" may require further elucidation and consideration.

Assessment of Profits Paid to Participating Policy-holders.

The third judgment of the Judicial Committee to which reference has to be made is *Bharat Insurance Co., Ltd.* v. *Commissioner of Income Tax, Punjab* (1934 Inc. Tax Rep. 63) in which their Lordships have held, applying the principle laid down in *Last's case* (2 Tax Cas. 100) and *Pondicherry Railway Co.* v. *Commissioner of Income Tax* (1931 Comp. Cas. 314) that the profits paid by an insurance company to participating policy-holders is not expenditure incurred for earning the profits but the profits of the company and is liable to be assessed to income-tax. The counsel for the Bharat Insurance Company contended that *Last's case* required re-consideration but their Lordships declined to do so and followed that case.

In this connection we may draw the attention of insurance companies to the fact that the English Legislature has passed an enactment to exempt profits paid to policy-holders from income-tax subject to certain reservations. (*Vide* Section 16, Finance Act, 1923). Bhide, J., who wrote the leading judgment of the Lahore High Court which was confirmed by the Judicial Committee in this case said as follows: "It is, of course, open to the Legislature to adopt the same course in their country." Their Lordships of the Privy Council also referred to the fact that in England such profits have been exempted by the legislature. We hope insurance companies doing business in India will bring the matter to the notice of the Indian Legislature and see that an enactment similar to Section 16 of the Finance Act 1923 (of England) is passed in India.

Succession to Joint Family Business.

Where the members of an undivided Hindu family who carry on a joint family business divide and the business is carried on by some of the members is there a 'succession' to the business within the meaning of Section 26 (2) of the Income Tax Act? This important question was considered recently by the

Rangoon High Court (Page, C. J., Das J., Mya Bu, J.) in *Commissioner of Income Tax, Burma* v. *N. N. Firm* (to be reported shortly). A joint family consisting of a father, his three sons and a grandson carried on the business of rice-milling and money-lending. Four of the members purchased the one-fifth share of the other member in the rice-milling business and continued to carry on that business as their own. As regards the money-lending business the assets were divided into five shares. The four members carried on money-lending business at the old premises in the manner in which it had been carried on before the partition took place. The fifth member started a new money-lending business in a new name and in new premises with his one-fifth share. It was held, that, as regards the rice-milling business the four members who had purchased the other member's share 'succeeded' to the old business, but as regards the money-lending business there was no 'succession' within the meaning of Section 26 (2) of the Act. The principle applicable to such cases is thus stated by Page, C. J.:—" In order that a person should be held to have succeeded another person in carying on a business, profession or vocation it is necessary that the person succeeding should have succeeded his predecessor in carrying on the business as a whole. Where a business is split up and thereafter another person carries on part of the business, I am of opinion that he does not succeed his predecessor in carrying on the business within Section 26 (2)." His Lordship has also referred to another principle which has to be remembered in this connection, namely, that where there is no continuity in carrying on the business and when one business has come to an end and after a time another business is started, it may be with the same assets and under the same conditions and in the same premises as the old business, the persons carrying on the new business do not 'succeed' those who had carried on the old business within Section 26 (2) of the Act.

Assessment of Company in Liquidation.

The question whether a company in liquidation is bound to make a return of income-tax was recently referred to the Allahabad High Court in *Commissioner of Income Tax* v. *Agra Spinning and Weaving Mills Co., Ltd.* (1934 Income Tax Rep. 79). It was contended on behalf of the liquidator that

a company in liquidation is not bound to make a return. Their Lordships (Mukerji & Young, JJ.) rejected the contention and held that a company in liquidation is still a company within the meaning of Section 3 of the Income Tax Act, the official liquidator can be treated as the principal officer of such a company within the meaning of Section 2 (12) and that the liquidator was therefore liable to make a return. In this case the liquidator continued to carry on the business of the company, with the permission of the Court. The question whether the liquidators can be said to carry on a business where they are only winding-up the company did not arise for decision in the case.

Application of Income and Allocation out of Revenue before it becomes Income.

The case of *Commissioner of Income Tax, Bihar & Orissa* v. *Manager, Katras Encumbered Estate* (to be reported shortly, illustrates the difference between an application by the assessee of part of his income in a particular way and an allocation of a sum out of revenue before it became the income of the assessee, which was pointed out by the Judicial Committee in *Bejoy Singh's case* (1933 Inc. Tax Rep. 135). The owner of a coal mine mortgaged the mine to a creditor and leased it to him. The mortgagee undertook to pay Rs. 8,000 out of the royalties to the owner and to apply the balance of such royalty as might be payable to him for the discharge of the mortgage debt. It was argued on behalf of the owner that since all excess of royalty over and above Rs. 8,000, was retained by the mortgagee and did not come into his hands it could not be regarded as his income. A Special Bench of the Patna High Court (Courtney Terrell, C.J., Kulwant Sahay and James, JJ.) held, distinguishing *Bejoy Singh's case* that the portion of the royalties applied to the discharge or the debt was also part of the income of the assessee. " The position ", their Lordships said, " does not differ in the least from what it would have been, had the provision been that the lessee was to pay the whole of the royalty direct to the assessee and then that the assessee was to pay back a portion of the royalty to discharge his debt to the lessee." The case was one of application by the assessee of part of his income in a particular way and not an allocation out of the revenue before it became the income of the assessee.

NOTES AND COMMENTS.

Earning Year, Assessment Year and Corrective Year.

In dealing with Indian income tax law we have to refer often to the year in which income was earned, the year in which assessment is made and the succeeding year, before the expiry of which the income tax authorities have to initiate proceedings for re-assessment under Section 34. In the recent judgments relating to the assessment of Messrs. Burn & Co., we find the expressions 'earning year', 'tax year' or 'assessment year', and 'corrective year' used by the counsel and the Judges to denote these three years respectively. These expressions are suggestive and convenient, and will be used by us in the above said sense.

Assessment of Interest Accruing Due to Money-lender.

The Lahore High Court has, in *Narain Das Bhagwan Das* v. *Commissioner of Income Tax, Punjab*, decided by Tek Chand, J., and Monroe, J., on November 24, 1933, re-affirmed the principle that interest which has accrued to a money-lending firm in the earning year is not assessable as income, profits or gains of the business, unless it was *realised* or *received* in that period, and that the mere fact that the debtor of an assessee had made an entry in his books showing a credit to the assessee for the amount of interest due in the accounting period does not necessarily mean that the amount had been received or realised by the assessee. Even if the credit had taken the form of adding the interest to the principal and admitting liability for the aggregate amount due without anything being actually paid in cash or kind to the creditor, the creditor will not be liable to be taxed in the year. In order to justify assessment there must be a clear finding based on some evidence that the amount was received in some form or other by the assessee.

Partition of Joint Hindu Family.

Section 25-A of the Indian Income Tax Act which lays down the procedure to be followed when a member of a Hindu family alleges that there has been a partition of the family is one of the most important sections of the Act and income tax authorities have to apply the section very often. What amounts to

'partition' within the meaning of the section is not free from difficulty. The question whether it necessarily means partition by metes and bounds has been referred by a Division Bench of the Lahore High Court to a Full Bench. In a recent case decided by the Allahabad High Court, *Biradhmal* v. *Income Tax Commissioner* [to be reported shortly], Naimatullah, J., has made some clear pronouncements on the subject. In his Lordship's view what Section 25-A contemplates is "a separation of the members of the family which implies that the status of certain members undergoes a change . . . Partition of the joint family by metes and bounds is not a necessary requirement of the disruption of the family. If the properties remain intact but the separating member's share in them is defined they are nevertheless considered to have been partitioned. Partition contemplated by Section 25-A is not necessarily a partition by metes and bounds."

Another question that arises in this connection is whether 'partition' includes partial partition. Partition may be partial in respect of the members of the family or in respect of the family properties. In the first case, namely, where a few of the members separate leaving the others joint, it has been held that there is a partition at least so far as the members who have separated are concerned and Section 25-A comes into operation. Where the partition is partial in the sense that only some of the properties belonging to the family were divided has Section 25-A any application? This question has been answered in the negative in *Biradhmal's case*. Though on the particular facts of the case the question was rightly answered in the negative we think the question as put is not capable of any broad answer in the affirmative or negative. The real test is whether there was an intention to alter the *status*. If the idea of the members was to separate and destroy their joint status the mere fact that some properties were left out either intentionally or by mistake to be divided later on would not render Section 25-A inapplicable.

Assistant Commissioner's Power to take Additional Evidence in Appeal.

Biradhmal's case contains also a learned discussion of the question whether the Assistant Commissioner of Income Tax has power to take additional evidence in an appeal pending

before him, and to set aside the assessment on the basis of such evidence. The opinions of the learned judges who decided the case (Bennet and Naimatullah, JJ.) on the point slightly differ. Bennet, J., holds that the section [Section 31 (3) (*b*)] means that the assessment should be set aside on the ground that it is defective on the record as it stands and not that it should be set aside on the ground that new evidence if heard and accepted would prove that the assessment was defective. Naimatullah, J., on the other hand, is of opinion that no analogy can be drawn from Order 41, Rule 27, C. P. C., to determine the powers of the Assistant Commissioner hearing an appeal under the Income-tax Act; the latter gives unrestricted discretion to the Assistant Commissioner to make further enquiry, that is, to obtain more evidence throwing light on the question which he is called upon to decide, while Order 41, Rule 27, C. P. C., confers very limited powers upon a court of appeal in the matter of admitting fresh evidence.

Capital Receipt and Revenue Receipt: Sums Received for Imparting Secret Knowledge.

The recent decision of the English Court of Appeal in *Page* v. *Butterworth* (*Inspector of Taxes*) shows the narrow line that marks the distinction between a capital receipt and a revenue receipt. The assessee was a leader in the construction of æroplanes. The Government required large bomb-carrying æroplanes in 1917. The assessee, in order to increase the out-put of the machines, imparted his special knowledge of their construction to the Government contractors and received as an *ex gratia* payment a sum of £ 39,000 for his collaboration and assistance rendered to the Government. Finlay, J., upheld an assessment of this sum to income-tax. The Court of Appeal (Lord Hanworth, M. R., Slesser and Romer, L. JJ.) reversed the judgment of Finlay, J. They said that the sum of £ 39,000 which was received by the assessee was not received by him in the course of carrying on his business as he had handed over the substratum of his business to his rivals. It was a mere voluntary gift which was a capital asset and not liable to be assessed to income-tax. Romer, L. J., said: "Here at the invitation of the Government he (the assessee) surrendered to the world his secret knowledge and his capital asset thereupon ceased to exist.

The payment in question, in my opinion, was made to him for the surrender of his capital asset and in his hands is capital money not taxable under Sch. D or any other schedule." Their Lordships applied the principle which was laid down recently by the House of Lords in *Stedeford* v. *Beloe* [(1932) A. C. 388].—The case will be shortly reported in full.

Reference: Power to Require Commissioner to State Case Arising out of Proceedings in Revision.

There has been much divergence of judicial opinion in India on the question whether the High Court has power under section 45 of the Specific Relief Act to require the Commissioner of Income-tax to state a case on an order made in exercise of the Commissioner's power of revision under section 33 of the Income-tax Act. The Bombay High Court has in *Tata Hydro-Electric Agency Ltd.* v. *Commissioner of Income-tax, Bombay* (1934 Inc. Tax Rep. 103) followed the view that there is no obligation on the Commissioner to state a case on an order made under section 33 and the High Court has therefore no power under section 45, Specific Relief Act, to require him to state a case on such an order. The question has lost much of its importance now as the Income-tax (Second Amendment) Act of 1933 has made express provision for statement of case on orders made under section 33. The proviso contained in the amendment that 'a reference shall lie from an order under section 33 only on a question of law arising out of that order itself and not on a question of law arising out of a previous order under section 31 or section 32 revised by the order under section 33' considerably curtails the scope of the amendment and leaves the law still in an unsatisfactory state, for it is even now open to the Commissioner in any case to send for the papers under section 33 and make an order and thereby deprive the assessee of his right to bring matters arising out of the previous orders made under section 31 or section 32 to the High Court—a serious defect in the Act of 1922, which has been pointed out in several decisions.

Reference: Commissioner's Power to State Case under Sec. 66 (1) After Disposal of Case.

The observations which have been made by Beaumont, C.J., in the above mentioned case on the power of the Commissioner to make a reference, under section 66 (1) of the Act after the

disposal of the case are of greater importance in practice than the actual decision itself. The Commissioner stated in this case that a reference to the High Court under section 66 (1) can only be made *in the course of* any assessment or any proceeding in connection therewith an not after the case has been finally decided and held that as he had decided the case he had no power to make a reference. In regard to this, the Chief Justice said: "With all respect to the learned Commissioner I think that the reason he has given for not stating the case cannot be supported." If a question of law arose in the course of assessment proceedings, the case can be stated even after the disposal of the case.

House Allowances: English and Indian Law.

When an officer of the Government receives (1) a house allowance in addition to his salary or (2) is provided with an official residence, is this allowance or the value of the residence provided, assessable to income-tax. This interesting point was decided in England in *Corry* v. *Robinson* [1934 Inc. Tax Rep. 88; 102 L. J. K. B. 689]. With regard to allowances for residence Finlay, J., held that they were clearly assessable. His Lordship said: "what it really comes to is this: that extra money goes into the appellant's pocket. Extra money goes into his pocket in order that he may able to provide himself with a house. It seems to me to be clear, both on principle and as the result of the several authorities to which my attention was called that the deduction cannot be allowed."

It may appear at first sight that, where, instead of being given a house allowance, the officer is provided with residence, the value of the residence should similarly be treated as his income. But this is not so. Rowlatt, J., said in *Cordy* v. *Gordon* [1925, 9 Tax Cas. 308] that: "If the holder of an office receives a salary in money, and in addition to that salary receives some advantage such as residence, or residence with board and washing, of which he is obliged to avail himself and which he cannot in any case transfer to another for profit to himself, the amount of his income for purposes of taxation is limited to what he receives in cash. Finlay, J., quoted these remarks of Rowlatt, J., with approval and held that the value of the residence could not be counted as part of the officer's income. The

underlying principle is that 'income tax is, after all, a tax on income, that is, on what goes into the taxpayer's pocket. The mere fact that he may be saved something by being given a house does not constitute his income for the purposes of taxation'.

The Indian law, however, runs contrary to this principle, for the Explanation to Section 7 (1) of the Indian Income Tax Act provides that 'the right of a person to occupy free of rent as a place of residence any premises provided by his employer is a perquisite for the purposes of this sub-section'.

Income Tax.

The *Law Journal* of England contains a very interesting article on INCOME TAX. The learned writer has pointed out several disabilities that assessees are labouring under in England and many of them are applicable to India with even greater force :—

"If one of us were held up on the highway and robbed of one-fourth of his possessions, even if he were a moderate man, he would express justifiable indignation. When the same thing is done by the State by levying taxes, although we may acknowledge the necessity, the conditions of such appropriation will nevertheless be scrutinised with jealousy. The whole subject of the assessment of income and the imposition of tax is sufficiently complicated in itself; but, so far as concerns us, complication has been aggravated by a early series of Finance Acts, with cross-reference, and an attempt to consolidate made in 1918; and the result is little short of confusion. Nor has confusion been lightened to any great extent by the accumulation of case law affecting the proper construction of this legislation.

From the very outset the taxpayer is prejudiced by the overwhelming weight of the fact that he is involved in controversy with the Crown. This action, for it is nothing else, is, it is submitted, derogatory to the Sovereign, and unfair to the subject. It is a fiction that the Revenue boosts as reality. It permeates its whole organisation, until each Inspector who manages one of the local taxing offices insists on being addressed as "H. M. Inspector of taxes." Where the majesty of the Crown is applied to overbear and browbeat unfortunate subjects

its misuse is obvious, and the users should be deprived of that means of attack. After all, the Revenue is quite as much subject to legislation as other people; and *qua* litigant, the Revenue should be placed on an equal footing, in all respects with other parties.

These Finance Acts, nets thrown to encompass such a diversity of circumstances, are so involved in verbal mystery as to form a language of their own. In the laudable object of preventing evasion by unprincipled persons, the zeal of the Revenue has too often resulted in the oppression of those who are honest. The anomalies lurking in this position are the subject of continual exposure in the press. But such is the general selfishness and consequent want of corporate sympathy and activity that little or no attempt to gain relief has been made. The instinctive shrinking that each of us has from an investigation into his personal and private affairs is a strong case of ineffectiveness. In such circumstances, propaganda is required to encourage and inspire the public to action.

The main object of this paper is to point to the substantial injustice which those who pay sums up to, say 300*l* yearly in income-tax have to suffer; and it will not be disputed that they are the majority of income tax payers. This injustice arises from the fact that they are bound to accept the assessment of the revenue without effective challenge owing to the cost and delay of proceedings by way of appeal. Generally speaking it does not pay in such cases to appeal, whatever the result may be.

It will have been observed what a slender use the Revenue makes of the opportunities given, when annual Finance Acts are being passed, to correct any errors that experience brings to light.

Surely, it would be fairer to the taxpayer that the Revenue should suspend action against him for an year, and by necessary amendment in the ensuing Act remedy the difficulty by clear expression of its intention, rather than force litigation on unfortunate taxpayers, which runs on the construction to be placed

on faulty legislation, for which the Revenue, and not the taxpayer, was responsible. In this way, much costly litigation might be avoided.

Again, a substantial simplification of procedure and reduction of the cost of litigation would be effected by assigning all proceedings, causes and disputes in connection with income tax, where the amount of the tax in dispute does not exceed, say 300*l* in any year, to the County Court which might be given in such matters (as now it has, for instance, in bankruptcy), all the powers of the High Court. Rules should be made to provide for any necessary change or amendment in ordinary County Court procedure to accompany such a statutory change. In addition it is suggested that power should be given to the Court, if so minded, to order the trial to be taken *in camera*. These suggestions would avoid the long procedure of the special case provided for in the Finance Act, 1918, found often to be extremely unsatisfactory in practice, and liable to delay, expense and obstruction. There would also be saved all the difference between the County Court and the High Court scale of costs; and the time occupied in disposing of cases would be greatly diminished.

No doubt the changes suggested will meet with opposition from vested interests, and some others. The balance of convenience, however, it is claimed, belongs to the taxpayer. Among the objectors might be County Court Judges who at the present time having regard to the additional burdens placed on them, are underpaid. If, however, the Revenue as regards litigation is placed on the same footing as any other litigant, and it is restrained from appeals beyond the judgment of, say, one Court of appeal where the construction of any Finance Statute or Rule is involved, the suggested amendments would, it is contended, result in substantial saving of both expense and time. It is also suggested that the Crown should be bound by agreements made on its behalf by its servants and agents to the same extent as the subject." The learned writer also pointed out the inadequacy of the tribunals, as at present constituted, to hold the scale of justice fairly and steadily as between the State and the individual.

NOTES AND COMMENTS.

Judicial Committee on Assessment of Trustees.

The law relating to the liability of trustees to be assessed to income tax on the income of the trust is in a somewhat unsettled state. The Indian Income Tax Act does not make any provision except with regard to assessment in the case of non-resident beneficiaries. The recent judgment of the Judicial Committee in *The Trustees of the Currimbhoy Ibrahim Baronetcy Trust* v. *Commissioner of Income Tax, Bombay* (1934 Income Tax Reports 151) however contains some important pronouncements on the subject. In the first place, their Lordships have clearly laid down in this case that there is no justification for laying down as a broad proposition that trustees are not liable to be assessed at all. They have pointed out that Sections 38 (2) and 40 of the Indian Income Tax Act which refer to the assessment of trustees are not intended in any way to exempt trustees from asssessment in other cases. Apart from these provisions there are many cases in which trustees could properly be assessed to income tax in respect of the trust income. The decision of the House of Lords in *Williams* v. *Singer* [1921, 1 A.C. 65] which is often cited in support of the proposition that trustees are not liable to be assessed has been explained by their Lordships. *Williams* v. *Singer* does not support any such contention. The effect of the opinions delivered in the case is exactly the contrary.

The judgment also throws much light on the circumstances under which trustees could be assessed. Where by a trust deed the trustees had to maintain certain funds from the trust income and to defray certain outgoings and the beneficiary was entitled only to be paid what remained after these liabilities had been met, their Lordships held that, so far as regards the income which was employed in maintaining the funds and defraying the outgoings the trustees were clearly liable to be assessed. Even with regard to the part of the income which was paid to the beneficiary their Lordships were of opinion that the trustees were liable to be assessed.

If the trustees are to be assessed, the question would immediately arise whether the graduation of the tax is to be applied with reference to the total income of the trustees? On this point their Lordships say that it may be that it will be found compatible with the scheme and machinery of the Act to have the scale of tax adjusted according to the total income of the beneficiary individually. These and other practical difficulties which may arise have been left to be solved when they directly arise for decision.

Capital Loss and Loss in Business.

In re Ganga Sagar [1934 Inc. Tax Rep. 155] illustrates the difference between capital loss and loss in business. The assessee claimed to deduct from his income loss which he had incurred in respect of shares in a company which went into liquidation and in respect of certain Government securities which he had to sell at a loss. The Commissioner found that the assessee did not carry on any business in the purchase and sale of shares and securties and that he had only invested his capital in the shares and securities to earn dividends and interest. Their lordships held that the crucial question in such cases was whether the intention of the purchaser —which is to be deduced from the facts was to carry on the business of purchase and sale or merely to invest his capital and that on the findings of the Commissioner the assessee had no case.

Maximum Amount of Penalty.

Under Section 23 of the Income Tax Act if the income-tax authorities are satisfied that an assessee has concealed the particulars of his income or has deliberately furnished inaccurate particulars of such income and the income has thereby been returned too low, the income tax authorities may levy, by way of penalty, a sum not exceeding the amount of the income tax which would have been avoided if the income so returned by the assessee had been accepted as the correct income and it was held in *Commissioner of Income Tax, Burma* v. *A. A. R. Chettiyar Firm* [I. L. R. 11 Rang. 75] that under this section the maximum penalty which could be imposed is a sum representing the difference between the tax on the income declared by the assessee and the tax on the income ascertained under the Income Tax Act in respect of which the assessment has been made.

This interpretation of the section has been affirmed by the same High Court recently in *K. M. O. Chettyar* v. *Commissioner of Income-tax, Burma* [1934 Income-tax Rep. 159]. This case also illustrates the way in which the section has to be applied. The assessee carried to a misleading head sums amounting to Rs. 38,000 and showed a net loss of Rs. 31,751 odd in the return. They were assessed under Section 24 (3) on Rs. 50,000. It was held that the maximum amount of penalty that could be imposed was the difference between the tax on Rs. 50,000 and the tax on no income, that is *nil*. The assessees' contention that the maximum amount could not exceed the tax on Rs. 12,000, *i.e.*, the difference between Rs. 50,000 and Rs. 38,000, as they had shown the income of Rs. 38,000, was rejected as wholly fallacious.

Reference in Best Judgment Assessment Cases.

There has been very keen conflict of judicial opinion on the question whether an application to the High Court to require the Commissioner to state a case on points of law arising out of a best judgment assessment lies. A Division Bench of the Allahabad High Court [NIAMATULLAH AND BENNET, JJ.] have recently given an emphatic answer in the negative in *Jot Ram Sher Singh* v. *Commissioner of Income-tax* [1934 Inc. Tax Rep. 192]. Their Lordships have followed the latest ruling of the Rangoon High Court in *Abdul Bari Choudhry* v. *Commissioner of Income-tax* [(1931) 9 Rang. 281] in preference to the Full Bench ruling of the Patna High Court in *Ananda* v. *Commissioner of Income-tax* [(1931) 11 Pat. 181] and the earlier rulings of the Rangoon High Court. That there is some difficulty in accepting this view is apparent from the fact that in *Abdul Bari Chowdhry's* case PAGE, C. J., had to make a reservation that if the Income-tax Officer makes an assessment under Section 23 (4) deliberately knowing that the facts do not justify such procedure, the Court has inherent power to make the officer do his duty, apart from the provisions of the Income-tax Act.

We think the view that if the Income-tax Officer has stated that he has made the assessment under Section 23 (4) there can be no appeal or reference, on the one hand, as well as the other view that whenever he has acted arbitrarily or illegally in making the assessment an application for reference can be made, both go

too far. The proviso to Section 30 (1) lays down that no appeal shall lie in respect of *an assessment made under sub-section (4) of Section 23*. The crucial question to be decided in such cases is whether the assessment was made under Section 23 (4) and the answer to this question does not depend on what the Income-tax Officer or Assistant Commissioner thought or said, but on the real nature of the assessment in substance and in fact. When an application for an order requiring the Commissioner to state the case is resisted on the ground that the assessment was a best judgment assessment, the High Court has therefore to decide whether the assessment was in reality one under Section 23 (4). If it was, no order for reference can be made even though the Income-tax officer might have proceeded illegally; if it was not in substance an assessment under Section 23 (4) an appeal would lie and the High Court would have jurisdiction to require the Commissioner to make a reference. The point which we wish to emphasise in this connection is that what the Income-tax Officer or the Assistant Commissioner thought or said or purported to do does not conclude the matter. This is in consonance with the established principle with regard to the law relating to appeals that the appealability of an order depends on the real nature of the order itself and not on the provision under which the lower Court purported to act or thought it was acting.

Best Judgment Assessment is not Penal Assessment.

Justice Niamatullah has made some important observations in this case on the nature of best judgment assessment which deserve to be widely known. As this mode of assessment is prescribed for cases where the assessee has not complied with an order for production of accounts, we may be tempted to regard it as a penal provision. His Lordship has rightly pointed out that "It should be borne in mind that an assessment under Section 23 (4) should not be influenced by a desire to punish the assessee for non-compliance with a notice under Section 22 or Section 23, however culpable such non-compliance may be. Any deliberate concealment or mis-statement of the particulars of his income by the assessee is made punishable by Section 28 and if his act amounts to an offence under that section he should be tried and convicted of the offence if proved, in which case the

law gives him a right to appeal, but to punish him indirectly by making a so-called best judgment assessment is wholly unwarranted."

Assessment of Co-operative Societies: 'Income' and 'profits' distinguished.

A judgment of considerable importance affecting co-operative societies was recently pronounced by the Rangoon High Court (Page, C. J., Das and Mya Bu, JJ.,) in *Commissioner of Income Tax, Burma* v. *Bengalee Urban Co-operative Credit Society Ltd.* [1934 Inc. Tax Rep. 121]. Under the Notification of the Governor General in Council dated August 25, 1925, the 'profits' of a co-operative society are exempt from income tax. Is income derived from interest on securities or house property 'profits' within the meaning of this Notification and exempt from tax? The learned Judges of the Rangoon High Court have drawn a distinction between 'income' on the one hand and 'profits and gains' on the other. In their Lordships' opinion "income", as contrasted not with capital but with 'profits' or 'gains' in the Income Tax Act means a periodical monetary return coming in and accruing to the assessee independently and not as the net proceeds of a business carried on by the assessee as defined in Section 2 (4) of the Act. Income in this sense connotes incoming without regard to outgoings. On the other hand, profits in this connection are "the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose or earning those receipts." Having drawn this distinction between 'profits' and 'income' their Lordships hold that the term 'profits' is used in the Notification in this latter sense and that *prima facie*, therefore, neither interest from securities nor income derived from property are 'profits' within the meaning of that term as used in the Notification. Their Lordships are not prepared to go so far as to hold that such income can never be profits. It may be that investment of capital in securities or property is part of the business of the assessee and whether they are 'profits' of a business is a question that depends on the circumstances of each case the burden of proof being upon the assessee. In accordance with this view their Lordships remanded the case which was referred to them for a determination as to whether or not the income which had accrued due to the society in the particular case from interest on securities and income from

property and other sources formed part of the profits of the business carried on by the society. The decision of their Lordships differs from the judgment of the Madras High Court in *The Madras Provincial Co-operative Bank Ltd.* v. *Commissioner of Income-tax* [1933 Inc. Tax Rep. 158] in this important respect that their Lordships hold that if, as a matter of fact, investments in securities or property was part of the business of the society income derived therefrom would be exempt. Co-operative societies would therefore be well advised in making such investments a part of their business.

Purchase and Sale of Land for Profit.

Purchase and sale of land for profit is of common occurrence and we may often have to decide whether profits made in this manner are assessable to income tax. The following question and the answers given thereto which appear in the *Law Times* (of England), February 17, are instructive:—

Question.—A. B. C. and D. entered into an agreement to purchase a large parcel of ground rents with a view to re-sale at a profit, which was successfully accomplished and the profit divided. The re-sales totalled nine, and the whole transaction was completed in a period of approximately three months Is the profit an "accretion of capital"; or is it "a taxable profit"?—none of the parties having before been concerned in a similar transaction.

Answer.—The question whether the net proceeds of the sale of land are profit of a trade or accretions to capital. and, in the latter case, not subject to income-tax, is frequently a difficult one. In this case, however, the transactions of A B. C, and D. appear clearly to have beon isolated transactions and not the case of the carrying on of a trade The decision of the House of Lords in *Jones* v *Leeming* (143 L. T. Rep—50; (1930) A. C. 415) covers the case, and shows that tax is not payable: (See Konstam, "Law of Income Tax," 6th Edition, page 122).

Answer—The facts mentioned in the query appear to closely resemble those in *Pearn* v. *Miller* (1927, 11 Tax Cas. 610) and *Jones* v. *Leeming* (143 L. T Rep. 50; (1930) A. C. 415). The transaction is not "a concern in the nature of trade," but is an insolated transaction of purchase and re-sale of property. The profits therefrom are not, therefore, subject to income-tax under Case VI of Schedule D of the Income Tax Act, 1918.

Answer.—The amount realised by the respective parties to the profits resulting from the sale of the ground rent is not a "taxable profit," but an "accretion of capital," as the profits are not income, but, if the parties make a trade or business of buying and selling ground rents, then the profits would be taxable

The decisions of India are also to the same effect. Readers who feel interested may refer to the cases cited at pp. 70 & 71 of A. N. Aiyar's *Income Tax Digest.*

NOTES AND COMMENTS.

Assessment of Impartible Estates.

There are conflicting rulings on the law relating to the assessment of impartible estates. We had adverted to this subject in our comment on *Diwan Kishen Kishore* v. *Commissioner of Income Tax, Punjab*: (vide 1933 I. T. R. Notes and Comments, p. 11). In the earliest case on the subject, *Rajah Siva Prasad Singh* v. *The Crown* (I.L.R. 4 Pat. 73: 1 I.T.C. 384), where the holder of an estate had created by his will a charge over the whole income of the estate for certain maintenance allowances payable to his widows, it was held that the successor was not entitled to deduct the sum so paid by way of maintenance to the widows in the absence of evidence showing to what extent the allowances were charged on the assessable income of the estate. It was further held that the holder of an impartible estate is assessed as an individual and not as the head of a joint Hindu family for purposes of super-tax. In *Diwan Kishen Kishore's case* (1933 I. T. R. 143) it was held that the allowance payable to the junior member in that case was not part of the income of the family but was a sort of charge on the estate and should be deducted in calculating the assessable income of the holder. In the case of impartible estates the allowance payable to the junior members was, in their Lordships' view the separate property of the junior members upon which they could be separately assessed. It was however held that an impartible estate was still a joint family and for purposes of super-tax and the assessment of the holder of such an estate must be considered as the assessment of a joint Hindu family. This view, it will be noted, is in direct conflict with that taken in *Siva Prasad Singh's case.*

Recent Rulings.

We have now two other important rulings on the subject, one of the Allahabad High Court and the other of the Madras High Court. In *Maharaja Kumar of Vizianagaram, In re,* reported in this issue (1934 I. T. R. 186), after a careful

consideration of the nature of impartible estates and the latest pronouncements of the Privy Council on this subject, their lordships have held that in a family possessed of an ancestral impartible *raj*, every son acquires by birth a right to the estate and becomes a member of a joint Hindu family with the holder of the estate. Where, under a deed of trust the younger son of a deceased holder was entitled to receive a certain sum of money every month by way of allowance for maintenance, it was held that this allowance was received by the son as a member of an undivided Hindu family, and it was consequently exempt from income tax and super tax in his hands under Section 14 (1) of the Income Tax Act.

In the *Zamindar of Chemudu's case* the judgment in which was pronounced by the Madras High Court on May 2, 1934, the question which was referred was almost exactly the same as in the *Maharaja Kumar of Vizianagaram's case.* By an award the assessee, the younger brother of a deceased holder and the uncle of the succeeding holder of an estate, was entitled to an annual sum of Rs. 6,000 by way of maintenance out of the income of the estate. The question whether this amount was exempt from assessment in the hands of the assessee under Section 14 (1) of Income Tax Act was referred to the High Court and their lordships (Beasley, C.J., Ramesam, J., and Sundaram Chetty, J.) answered the question in the affirmative.

In view of the real nature of impartible estates and recent judgments of the Privy Council we have no doubt that the view taken by the Allahabad and Madras High Courts is the bettor one. We think the correct view is that :—

(i) an impartible Hindu raj consisting of junior members is still a joint Hindu family and the junior members must be considered to be members of the family, in the absence of proof of renunciation ;

(ii) maintenance allowances paid to junior members whether it be under will, deed of settlement, or otherwise are *prima facie* received by them as members of an undivided Hindu family, and are exempt from tax under Section 14 (1) ; and

(iii) for purposes of assessment to super-tax an impartible estate must be considered as a joint Hindu family and not as an individual.

Siva Prasad Singh's case and *Diwan Kishen Kishore's case* (though the latter may be distinguished as a decision on the particular facts of the case as we had stated at 1933 I.T.R. p. 11), in so far as they hold to the contrary, require reconsideration.

Service of Notice on Agent.

In the case of *Commissioner of Income Tax* v. *Baxiram Rodmal* decided by the Nagpur Judicial Commissioner's Court, the learned Judicial Commissioners have laid much stress on the necessity and importance of proper service of notice in matters relating to income-tax. Section 63 (1) of the Income Tax Act, provides that notices under the Act may be served on the person therein named either by post or as if it were a summons issued by a Court under the Civil Procedure Code. Summons under the Civil Procedure Code can be served only in person or on recognised agents or agents authorised to accept service of notices. Similarly, a service of notice under the Income Tax Act would not be valid unless it is served personally or on a recognised agent or on a person empowered to accept service. Where notice was served on a person who had accepted service of notices on some occasions it was held that this fact would not by itself constitute him an agent on whom a notice or requisition under the Act could be validly served and the notice was held to be insufficient. With regard to the procedure to be followed by Income Tax Officers the learned Judicial Commissioners say :

" We do not think it unreasonable to insist that Income Tax Officers, in doing the very important work of assessing income tax must take the elementary precaution of seeing that the person with whom they are dealing is in fact authorised to represent the assessee, and they are not entitled to assume this merely because such person has on occasions signed a notice, possibly under pressure, or produced account books for inspection."

The learned Judicial Commissioners seem to hold that unless the agent is a recognised agent within the definition of Order 3,

Rule 2, C. P. C., or is a person who has been authorised *in writing* to accept services, a service on him would not be valid. So far as the case lays down that the authority to accept must be in writing, it goes beyond the earlier decisions. It was assumed in the earlier cases that authority to accept service may be implied from the nature of the work carried on by the agent. [Vide: *Jangai Bhagat* v. *Commissioner* (I. L. R. 8 Pat. 877) and *Sunderlal* v. *Commissioner* (I. L. R. 10 Pat. 441)].

Assessment of Buildings Erected by Lessee.

The question whether a person who takes a property on lease and erects buildings thereon on the understanding that he could remove the buildings on the termination of the lease, is liable to be assessed to income-tax in respect of the annual value of the buildings under Section 9 of the Indian Income Tax Act was recently referred by the Commissioner of Income Tax, Madras, and the Madras High Court has answered the question in the affirmative in a judgment pronounced on the 1st of May. The contention on behalf of the assessee was that as he was not the owner of the site on which the building stood he was not an 'owner' within Section 9. Their lordships held that there was nothing to warrant this contention and that, as he was the owner of the building, he was liable to be assessed on the annual value of the building.

It should be noted, however, that in this case the assessee was entitled to remove the buildings. Difficult questions may arise where the lessee is not entitled to remove his structures but is, by the terms of his lease or under the provisions of any local statute, bound to surrender them to the lessor free or on receiving compensation. The question who is the owner of the building in such a case is not an easy one to solve.

NOTES AND COMMENTS.

Power of High Court to Require Commissioner to State Case on Questions not Raised Before Him.

There is keen conflict of judicial opinion on the power of the High Court to raise, in an income tax reference, questions not raised before the Commissioner. The Allahabad High Court has in several cases held that the High Court has such power and the Bombay High Court accepted this view in *The Commissioner of Income Tax, Bombay* v. *National Mutual Life Association of Australasia* (I.L.R. 55 Bom. 637; 1932 Comp. Cas. 1.) We have very often thought that this view was unsound. In *Maharaja of Darbhanga's Case* (1933 I. T. R. 94) the Judicial Committee observed as follows: "the duty of the High Court under Section 66, sub-section (5) is to 'decide the questions of law raised' by the case referred to them by the Commissioner and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the question to be decided as being......Their Lordships deprecate this departure from regular procedure......" Even after this pronouncement of the Judicial Committee the Allahabad High Court again followed the earlier cases in *Pallumal Bola Nath In re* (1933 I. T. R. 235) and the Judicial Commissioner's Court of Sind has, in a case decided in 1934 and reported in this issue observed that 'in hearing a case stated by the Commissioner the High Court is to decide the questions of law that arise in the case; it is not bound by the points of law raised by the applicant or the Commissioner: Vide *Khemchand Ramdas* v. *Commissioner of Income Tax, Bombay* (1934 I. T. R. 216). It is to be regretted that the attention of the Judges who decided these cases was not drawn to this opinion expressed by the Judicial Committee in *Maharaja of Darbhanga's Case* (supra).

Page, C. J., of the Rangoon High Court has, in *Commissioner of Income Tax* v. *C. P. L. E. Chettiar Firm* reported in this issue (vide 1934 I. T. R. page 201 *infra*) considered the matter in detail and laid down emphatically that the High Court

has no jurisdiction on an application under Section 66 (3) to order the Commissioner of Income Tax to state a case and refer any question of law which the assessee has not duly required the Commissioner to refer under Section 66 (2). His Lordship has also rightly pointed out that the view that in a reference under Section 66 (3) it is for the High Court to find out what is the point of law that arises and requires decision is wholly untenable. We entirely agree with the opinion of Page, C.J. The judgment in *Pallumal Bholanath's case*, suggests the possibility of one of the judges thinking that a certain question arises and the other judge think that another question arose and each giving an answer to the question raised by himself. The Commissioner will find himself in a rather difficult situation in such cases.

Assessment of Profits of Benami Transactions.

The decision of the Rangoon High Court in the *Commissioner of Income Tax, Burma* v. *Thaver Brothers* (1934 I.T.R. 230) deals with some interesting questions relating to income tax. In India persons whose names carry some credit often lend their names to others to enable the latter to obtain contracts from the Government or other big concerns, by taking a contract in their own name and giving a sub-contract to the person who is actually to do the work. In a case of this nature if the whole of the amounts received by the contractor are credited to the sub-contractor, is the contractor liable to be assessed in respect of the profits made by the transaction? Page, C.J., after referring to the fundamental principle that income tax is payable not upon *receipts* but upon *profits*, lays down the test to be applied in these words: 'If the assessee firm were carrying on the business and were acquiring the profits that accrued therefrom it would be immaterial what use they made of the profits that they received; but, if the true position was either that no profit at all from this business accrued to the assessees or that the assessees had to pay to the sub-contractors who were actually doing the work the whole sum which, if the assessees had done the work, would have represented profit accruing to them from the business, in either of such cases the receipts would not be assessable to income tax as against the firm.' Where the contractor's accounts showed that he did not enjoy any profits in the matter of the contracts and there was nothing

to discredit his accounts it was held that the income tax authorities would not be justified in assessing him.

In this case the contract was entered into really for the benefit of the sub-contractor. Different considerations may prevail where the real party is the contractor himself and a sub-contract of this nature has been entered into to avoid super-tax or with some other similar motive. We are not aware of any rulings with regard to assessment of income tax in respect of benami transactions. Many interesting questions may arise in future in respect of such transactions.

Assessment in Previous years : How far Binding in Succeeding Years.

The question how far a finding of fact arrived at in the assessment for a previous year is binding on the successor of the Income Tax Officer who made the previous assessment, in levying assessment for a subsequent year, is also discussed in *Thaver Brother's case* (supra). In connection with the assessment for a previous year it was found as a fact by the Income Tax Officer who made the assessment for that year that the profits accruing from certain contracts were profits of the assessee firm which they had been enjoying and in the assessment for a subsequent year the Income-Tax Officer thought that he ought to come to the same conclusion as that which the Income Tax Officer had reached in the previous year in connection with the assessment for that year unless the assessees satisfied him that the previous assessment was wrong. The learned Chief Justice held that this was not the correct way to approach the problem. "It appears to me," said his Lordship, "that the Income Tax Officer did not view this matter from the right angle, but, having the 1925-1926 assessment before him, he formed the opinion that he ought to come to the same conclusion as the Income Tax Officer in 1925-1926 unless he was satisfied that the decision of the Income Tax Officer for 1925-1926 was wrong. In my opinion, if he had approached the subject with an open mind, he would probably have come to the conclusion that in the circumstances of the present case there were no materials upon which he could find that the assessee firm were liable in respect of any profits accruing from these contracts." It is evident from these words that in his

Lordship's view the findings arrived at in previous years in such cases are not of much value. They are not *res judicata*. They do not even throw the burden on the assessee to prove that the findings are wrong. The revenue authorities should, to use his Lordship's words, "approach the subject with an open mind" in proceedings relating to assessment for subsequent years. [For the earlier cases on the subject, some of which appear to lay down a different rule see *Income Tax Digest* pp. 203 *et seq*].

Commissioner's Power to Revise : Time Limit.

Some important questions relating to income tax have been discussed in the judgment delivered in *Khemchand Ramdas* v. *Commissioner of Income Tax, Bombay* (1934 I. T. R. 216) by Aston, A.J.C., and Rupchand, A.J.C., of Sind. The assessees who had applied for registration as a firm failed to produce the accounts called for and the Income Tax Officer levied an assessment under Section 23 (4) and registered them as a firm. More than a year after the date of this assessment the Commissioner in exercise of his powers of revision under Section 33 of the Income Tax Act cancelled the order of registration and in pursuance of this order the Income Tax Officer made a demand for super-tax. The assessees appealed. The Assistant Commissioner heard the appeal and dismissed it but the Commissioner quashed the appellate proceedings as *ultra vires*.

The substantial point raised in the case was, whether the action of the Commissioner in cancelling the registration and the demand of super-tax were legal. The learned Judges held that the order of cancellation was under the circumstances illegal. Rupchand, A.J.C., said, "It may be that it is open to the Commissioner to review a wrong order at any time, and he can certainly do this for the future guidance of his subordinates. But if by such an order he wishes to prejudice the assessee in respect of the assessment already levied he can only do so "subject to the provisions of the Act" ...If the period within which an Income Tax Officer is empowered to issue a demand notice has expired the Commissioner cannot come to his help by a resort to the provisions of Section 33 and empower the Income Tax Officer to issue the demand notice after the expiry of such time and thus get over the period of limitation prescribed by the Act for the issue of a demand notice."

Demand of Super-Tax.

The question whether a demand for super-tax should also be made simultaneously with a demand for income tax is also mooted in the above mentioned case. Aston, A. J. C., points out that the form of notice of demand under Section 29 prescribed by the Rules provides for a simultaneous demand both for income-tax and super-tax. At any rate, the learned Judges held, there can be no doubt that the demand for super-tax must be made within a reasonable time, that is, at or about the same time as the demand for income tax. Two years delay was held to be wholly unreasonable.

Appeal in Best Judgment Assessment Cases.

A third and a rather more complicated question has also been discussed by Rupchand, A. J. C., namely, whether when an assessment has been made under Section 23 (4) an appeal would lie on the ground that the assessee ought to have been assessed in a different capacity, for instance, when the assessees have been assessed summarily as an unregistered firm, whether an appeal would lie on the ground that the assessment should have been made on them as a registered firm. The learned Judicial Commissioner is of opinion that an appeal would lie in such cases. There are numerous rulings on the question whether and when an appeal would lie from an order of assessment under Section 23 (4): (Vide A. N. Aiyar's *Income-tax Digest* p. 56, *et seq*). We are not entering into this troublesome question now but only wish to observe that in determining whether an appeal lies in such cases the crucial question to be determined is whether the appeal is one in respect of an assessment under Section 23 (4) and not the nature of the grounds upon which that assessment is challenged.

DEPRECIATION ALLOWANCE ON TRANSFER OF BUSINESS.

Two Conflicting Views.

When buildings or machinery of a company have been purchased ay another company, on what basis is depreciation allowance to be calculated? Section 10 (2) (*vi*) of the Income Tax Act provides in general terms, that in respect of buildings, machinery, plant and furniture depreciation allowance is to be computed on 'the original cost thereof to the assessee'. Where there has been a transfer of business does 'original cost' refer

to the cost to the purchaser company or to its predecessor ? This question was first raised in 1929 before the Madras High Court in *Massey & Co., Ltd.* v. *Commissioner of Income Tax, Madras* (56 M. L. J. 451; 115 Ind. Cas. 814) and the learned Judges held that the expression original cost in such cases meant original cost to the vendor company and not to the transferee. In 1932 in *Saraspur Mills, In re* (56 Bom. 129; 1932 Comp. Cas. 395) the Bombay High Court dissented from *Massey's case* and took the opposite view.

As soon as the Bombay High Court struck this note of dissent on the interpretation of the term 'original cost to the assessee' in Section 10 (2) (*vi*) of the Indian Income Tax Act, we pointed out that the law was following a wrong path. In commenting upon the Bombay case we said :

"Upon principle we think depreciation allowance must not be made to depend on the cost paid by the actual assessee (*i.e.*, the transferee) and that the decision of the Madras High Court is correct. Suppose, for instance that the assessee has obtained the machinery by way of gift or by force from another. Is he to get no depreciation allowance? Again, suppose an extraordinarily high price has been paid by the assessee in competition with a rival. Would the income tax authorities make a deduction on the basis of this price ? Various difficulties like these will occur if the Bombay case is to be followed. It is only upon the former principle (that is, the principle laid down in the Madras case) that the rule as to depreciation can be properly and equitably worked.

No doubt the wording of the Indian Act is 'the original cost thereof to the assessee' and the learned Chief Justice of the Bombay High Court has based his decision entirely upon this wording of the Indian Act. If 'assessee' is construed so as to include his predecessors in interest the foundation of the Bombay decision disappears and there would be no difficulty in adopting the sounder principle with regard to depreciation allowance which has been laid down by the English decisions and by the Madras High Court in *Massey & Co.'s case.* This construction has also the further merit that it gives full effect to the meaning of the expression '*original cost*'." [Vide 1932 Comp. Cas. Notes & Comments p. 59.]

Patna High Court agrees with Bombay.

The Patna High Court followed the Bombay view in preference to the view expressed in the *Massey's case* in *Motiram Roshan Lal Co., Ltd.* v. *Commissioner of Income Tax* (I.L.R. 12 Pat. 12; 1933 I. T. R. 329). The weight of authority against *Massey's case* was thus becoming stronger, but we were not still convinced of the soundness of the Bombay view and in a note printed at page 23 of the *Income Tax Reports for 1933* (*Notes and Comments*) we adhered to our view and pointed out that the learned editors of the *Madras Law Journal* were also against the Bombay view.

A New Principle.

Subsequently the matter arose for decision before the Rangoon High Court in *Commissioner of Income Tax, Burma* v. *Solomon & Sons* [I. L. R. 11 Rang. 514; 1933 I. T. R. 324]. Page, C. J., adopted a new line and held that 'original cost' means the *real value* to the assessee at the time when he acquired it whether he had paid anything for it or not. This reasoning, no doubt, removed some of the difficulties pointed out by us, for instance, where the successor had not paid anything for the machinery, and was sufficient to dispose of the case before his Lordship which was one of bequest. We have to observe however, in commenting upon this case (1933 Income Tax Reports, Notes p. 45) that the language of Section 10 (2) (*vi*), namely, '*cost to the assessee*' has to be stretched a good deal to bear such an interpretation and further it would lead to the necessity of an enquiry into the real value at the time of transfer in each case.

Madras High Court Adheres to Massey's Case.

The question was very recently considered by the Madras High Court in an important case decided on May 2nd: *In re The Buckingham and Carnatic Co., Ltd.* (to be reported shortly). The Buckingham Co. owns some of the biggest mills in South India and a large amount was at stake. The Company purchased the business of five other companies who owned buildings and machinery of the original value of Rs. 91,12,207. The buildings and machinery were purchased for Rs. 34,55,379. In view of the decisions of the Bombay, Patna and Rangoon High Courts the Madras High Court was asked to reconsider its decision in *Massey's case.* In a very learned judgment Sir Owen Beasley, C. J., Sir V. Ramesam, J. and Sundaram

Chetty, J. adhered to the view expressed in the *Massey's case* and refused to follow the other High Courts. Beasley, C.J., has pointed out in his judgment in this case that there is no foundation for the remark made by the Bombay High Court in *Saraspur Mills Ltd., In re* (*supra*) that Coutts-Trotter, C.J., was mistaken in *Massey's case* in supposing that there was any similarity between the language of the Finance Act of 1907 and the Indian Income Tax Act of 1922. Coutts-Trotter, C.J., did not fall into that error because he was clearly dealing with the language of these two Acts in dealing with the first question in *Massey's case*.

Apart from precedents, the learned judges of the Madras High Court have now clearly ruled that upon the true construction of Section 10 (2) (*vi*), depreciation allowance should be calculated on the cost to the original owner and not to the successor. As the learned Chief Justice observes, the important words of the sub-section are 'the original cost to the assessee.' The three other High Courts have stressed the importance of the words 'to the assessee.' Equal, if not more, importance should be given to the words 'original cost.' Even if there is any ambiguity the construction most favourable to the assessee should be adopted. 'Original cost' further sounds inconsistent with a figure which constantly fluctuates with successive transfers.

Conclusion.

Though we are glad to find that the Madras High Court has re-affirmed the view which appeared to us to be the sounder one, unless and until the legislature intervenes and puts the matter right there is bound to be confusion and conflict of opinion. As Page, C.J., in *Solomons' case* and Beasley, C.J., in *Buckingham Co.'s* case have pointed out the legislature when framing Section 10 (2) (*vi*) did not contemplate cases of transfer of business. This is a case of *casus omissus*. *Solomons' case* is important in that it directs our attention to the thing that ought to be the real basis of computation, *viz.*, *the real value of the machinery* and we hope the legislature would reframe Clause (*vi*) of Section 10 (2) keeping the English decisions and the real value of the machinery in view and would not leave in a state of confusion and uncertainty a question of such paramount importance to the business world.

NOTES AND COMMENTS.

An Anomalous Situation in the Administration of Income Tax Law.

The recent decision of the Madras High Court in the case of the *Buckingham and Carnatic Co., Ltd.* (decided on May 2nd) in which the Madras High Court refused to follow the view of the Bombay and Patna High Courts in the matter of calculation of depreciation of machinery on transfer of business reveals a situation in the administration of income tax law which is somewhat anomalous. The administrative control of the income tax department is central and the judicial control provincial and directions are given in the INCOME TAX MANUAL in accordance with the view which the Government prefers when there is a conflict of opinion between the High Courts. In this particular instance the INCOME TAX MANUAL provides that in computing depreciation allowance the rule laid down by the Bombay High Court in the *Saraspur Mills* case should be followed in preference to that in *Massey's* case: [*vide* Paragraph 46]. So long as *Massey's* case is law as far as the Madras Presidency is concerned, we do not think it was consistent with the respect and obedience that is due to the rulings of the High Courts, to issue departmental instructions contrary to that decision. Now that the Madras High Court has re-affirmed the view laid down in *Massey's* case, we think the provision in the INCOME TAX MANUAL that the *Saraspur Mills* case should be followed should be immediately deleted at least so far as the Madras Presidency is concerned.

Best Judgment Assessment.

Our current notions as to the nature of best judgment assessment may have to be entirely re-adjusted if the rules laid down by the Nagpur Judicial Commissioner's Court in regard to such assessments in the recent decision of *Commissioner of Income Tax* v. *Laxminarain Badridas* [1934 I. T. R. 246]

are warranted by law. The learned Judicial Commissioners have laid down in this case the following rules:

"(*a*) That in every case, before an *ex parte* assessment is made under Section 23 (4), Income Tax Act, the Income Tax Officer must invariably conduct such 'local' inquiry to ascertain the income of the proposed assessee for the previous year as the circumstances of the case may warrant; and

(*b*) that the said authority must place on the record a note of the details and results of his inquiry in order that the Commissioner of Income Tax under Section 33 or the High Court under Section 66 (2) or (3) may be in a position to see that the assessment was according to the rules of reason and justice and not arbitrary."

The learned Judges further say that 'it is such an assessment alone which would satisfy the requirements of an assessment by the Income Tax Officer made to the best of his judgment within the meaning of Section 23 (4) of the Income Tax Act' and that a point of law would invariably be involved in an *ex parte* assessment which is not shown to have been made by the Income Tax Officer to the best of his judgment as indicated by the above rules, so as to make it the subject of a reference to, and a decision by, the High Court under Section 66 (2) or (3) of the Indian Income Tax Act.

With all respect to the learned Judicial Commissioners we think they have gone too far. We do not think there is any justification either in the Act itself or the several cases which have been referred to by the learned Judges in their judgment for laying down any such broad propositions. The legislature has wisely left the matter with saying that the Income Tax Officer should make an assessment 'to the best of his judgment' in such cases, and we do not think that we are justified in imposing any obligation upon Income Tax Officers *as a matter of law* either to make any 'local enquiry' or to record the results of such inquiry. Nor are we aware of any decided case from which such rules can be deduced though, of course, the decisions have laid down—and laid down rightly—that an assessment under Section 23 (4) should be made 'according to the rules of reason and justice, not according to

private opinion; according to law, not according to humour,' and that such an assessment must be 'not arbitrary, vague and fanciful, but legal and regular.'

Where an assessment under Section 23 (4) is impeached as arbitrary, the fact that the officer has not considered any of the circumstances relevant for making an assessment to the best of his judgment nor made a note of them may be a matter to be considered, but to lay down that *in every case* before an *ex parte* assessment is made under Section 23 (4), the Income Tax Officer must *invariably* conduct such local inquiry as the circumstances of the case warrant and record the results of his inquiry and that such an assessment alone would be a legal assessment under Section 23 (4) is indeed going too far.

Assessment of Annuities.

The Indian Income Tax Act, unlike the English Act, contains no express provision for the assessment of annuities, and there is also no reported decision in India so far as we are aware in which the nature of annuities with regard to their liability to be assessed to income tax has been considered. The question has now been discussed in some detail in an important case which came very recently before the Patna High Court and which may for the sake of convenience, be referred to as the *Tikari Raj* case. The assessee was the owner of 9 annas share of the Tikari Raj. He became involved and transferred his estate to the owner of the remaining 7 annas share in consideration of the latter paying him a certain sum of money in cash and an annuity of Rs. 2,40,000 during his life. The question arose whether this annuity was capital or income and whether the assessee was liable to be assessed in respect of it. There was a difference of opinion in the High Court. COURTNEY-TERREL, C. J., and VARMA, J., held that this sum was income and not capital and was assessable. MOHAMMAD NOOR, J, held otherwise.

As regards the assessability of annuities, though there is no express provision with regard to them in the Indian Income Tax Act, there can be no doubt, as their Lordships have pointed out in this case, that annuities can be assessed to income tax in India also, as income from 'other sources' provided they are income and not capital. The question that has to be decided

in such cases is therefore whether the annuity sought to be assessed is a receipt of capital in annual instalments or a receipt by way of income.

It is also settled law as COURTNEY-TERREL, C. J., has pointed out in this case that an owner of capital may exchange it for an income which is taxable or for another form of capital which is not taxable. The fact, therefore, that an annuity was granted in exchange for capital does not necessarily make the annuity itself a receipt of capital. The crucial question is whether the intention of the parties was to provide for a return of capital in annual instalments or to secure an annual income to the grantee in return for his capital.

On considering all the circumstances of the *Tikari Raj* case we think the CHIEF JUSTICE and VARMA, J., were right in coming to the conclusion that the annuity secured under the deed of assignment in this case was really in the nature of income and not capital receipt. The parties had not cared in the assignment deed or even at the hearing of the case to ascertain what the actual value of the estate was. The annuity was to be paid not for a fixed number of years but during the life of the grantee. The object of the assessee as evidenced by the circumstances appears to have been, to use the language of the Chief Justice, to exchange his position of an owner for that of receiver of an income, rather than to stipulate for the payment of the price of his estate in instalments. The judgment is reported in full at p. 264 *infra*.

Interest Paid to Outgoing Partners by Surviving Partner who Takes up Entire Business : Whether interest on Borrowed Capital.

When one of the partners of a firm takes over the entire business of the firm paying the other partners their share of the capital with interest, is the surviving partner who succeeds to the business entitled to deduct the interest so paid to the outgoing partners as interest on borrowed capital under Section 10 (2) (*iii*) of the Indian Income Tax Act? This question was recently referred to the High Court of Madras by the Commissioner of Income Tax, and the High Court answered the question in the negative. Referring to sub-section (2) of Section 26 of the Income Tax Act, BEASLEY, C. J., said :—" The

plain reading of the sub-section is, in my opinion, that the predecessor's capital becomes the successor's capital and that for all purposes the succeeding partner is to be regarded as the former firm." Interest paid to the outgoing partners cannot in such cases be regarded as interest on any 'borrowed capital.' It is clearly capital invested in the business by the successor. The judgment will be reported in full in our next issue.

Failure to Maintain Stock Register : Whether Sufficient Ground for Rejecting Accounts and Making Assessment under Proviso to Section 13.

The judgment of the Lahore High Court delivered on June 29 in *The Pioneer Sports Ltd.* v. *Commissioner of Income Tax* throws much light on the question when an Income Tax Officer is entitled to reject the accounts of an assessee and make a computation of the profits under the proviso to Section 13 of the Income Tax Act. Their Lordships held that the Income Tax Officer is not entitled to reject the accounts merely because no stock register has been kept or because the profits shown are unreasonably low. After observing that the rate of profits to be charged is entirely a matter for the assessees to decide, their Lordships said : "The mere fact that they may choose to charge a low rate of profit is no reason for the Income Tax Officer to reject the total profits as stated by the company in their return. Nor is the absence of a stock register, when admittedly the company have never used a stock register any reason for justifying the assumption of the Income Tax Officer that the profits cannot properly be deduced from the returns submitted, when there is no other reason except the fact of reduced profit to justify this assumption." The Income Tax Officer thought in this case that a trading account based on an inventory not supported by a stock book can only be accepted if it discloses a reasonable rate of profit, and, rejecting the assessees' accounts on this ground, made an assessment of profits at 30 per cent. on the sales under the proviso to Section 13. The High Court held that the Income Tax Officer was not justified in rejecting the accounts and resorting to the proviso.

This case further lays down the important principle that though the Income Tax Officer is the sole arbiter for determining under the proviso to Section 13 how the profits are to be

computed, it is a question of law, into which the High Court is entitled to enquire, whether there is any evidence on which the Income Tax Officer could come to the decision that the method of accounting was such that the gains could not be computed except by the arbitrary method contemplated by the proviso. If there was no evidence to justify the Income Tax Officer's rejection of the method of accounting and it is clear that the assessment should have been made under the first part of Section 13 and not under the proviso, the High Court would interfere.

Casual and Non-recurring Receipt: Profits Accruing to Money-lender from Sale of Property.

The importance of the principle that in order that a receipt of income may be exempt from tax under Section 4 (3) (*vii*) of the Income Tax Act, it should not only be a casual and non-recurring one but a receipt not arising out of business or the exercise of a profession is emphasized in the recent judgment of the Madras High Court in *S. R. M. S. Subrahmanyam Chettiar* v. *Commissioner of Income Tax, Madras*, decided on May 2nd. This case shows that if the receipt in question can be reasonably deemed to arise from a business or the exercise of a profession it would be chargeable to income-tax, though casual and non-recurring in nature. The difficulty in such cases is not so much in determining the law but in applying the law to the facts of the case—in determining whether the particular receipt sought to be taxed is one arising from a business or the exercise of a profession. Whether profit accruing to a money-lender from the purchase and sale of land is a receipt of income arising from his business often arises in practice in assessing money-lenders and the judgment in question throws much light on this difficult question. In this case a money-lender got an assignment of a mortgage, sued upon it, obtained some properties in satisfaction of his decree and sold the properties later on at a profit. It was held that the profit thus made arose out of his business and was assessable. This case may be usefully compared with *Virappa Chettiyar* v. *Commissioner of Income Tax, Madras* [58 M.L.J. 95] which was a case on the other side of the line and with *Lakshmanan Chettiyar* v. *Commissioner of Income Tax, Madras* [58 M. L. J. 68] in which the profit was held to be taxable.

Income Tax and Liquidator's Remuneration.

The case of *Re Beni-Felkai Mining Co., Ltd.* [(1934) 1 Ch. 406] deals with an interesting question relating to income-tax. It was a claim by the Crown for income-tax in the winding up of an insolvent company, and the question raised was one of priority between the Crown and the liquidator in respect of his remuneration.

It was argued on behalf of the Crown that the liquidator was not entitled to retain any part of his remuneration until the income-tax was paid, that income-tax incurred in the course of liquidation was an expense of the liquidation, that it was part of the costs of the liquidation and must be provided for under Section 254 of the English Companies Act, 1929. It was further argued that it was at any rate an expense incurred in earning profits and so an expense within Section 254.

MAUGHAM, J., said:

"I have a difficulty in seeing how a liquidator who, in the course of his liquidation carries on the business of the company at a profit, the consequence being the assessment of the company to income tax, can avoid the conclusion that this is one of the expenses in the winding up......In my opinion, then, the sums in question are sums which can be properly treated as expenses in the liquidation."

REVIEW.

Company Law:—By K. J. Rustomji, Bar-at-Law; Second Edition: Revised and Enlarged, and annotated up to March, 1934: Published by Messrs. Butterworth and Co. (India) Ltd., 6 Hastings Street, Calcutta; 317, Lingha Chetty Street, Madras, and Jehangir Wadia Building, Bombay: Price Rs. 12 only.

Mr. K. J. Rustomji's Company Law is too well-known to the public to need any introduction. Mr. Rustomji is one of the leading text writers of India, who has maintained a reputation for careful and conscientious work. For accuracy of the text, clear analysis of the principles and careful execution, his commentaries stand foremost among Indian text books. He never omits any relevant authority

on the topics dealt with whatever his own view may be. The Second Edition of his Company Law was long overdue, but an author who wants to revise a work like this conscientiously is sure to take some time over it. We are glad to find that the learned author has not only added all the relevant cases, English and Indian, which have been decided after the first edition, but has also made a critical study of them as the brief comments which he has given about the cases cited show. The text of the Act has been very carefully edited and we would unhesitatingly recommend this work as a thoroughly reliable commentary on the Indian Companies Act—by far as the best work on the subject.

We would however, make two suggestions to the learned author; first, that those who have been accustomed to hear and see cases cited by the names of the parties—most of us we think have been trained in that way—would not like the system of citing cases by mere reference to the page of a journal in which the case is reported, especially when the same case is reported in several journals. Secondly, in a commentary on the Indian Companies Act in which more than fifty per cent. of the cases cited are sure to be cases on the English Companies Act, the text of the English Act might have been given. It would have been of immense help to Indian practitioners and businessmen, who are not expected to possess a copy of the English Act, in understanding the real significance and relevancy of the English cases that are cited. These are only our suggestions for further improvement and do not in any way mar the usefulness of this excellent work.

NOTES AND COMMENTS.

Bad Debt : Debt Due From Limited Company : A Privy Council Ruling.

In *Commissioner of Income Tax, Bombay* v. *F. E. Dinshaw* (1933 Comp. Cas. 9 ; I. L. R. 56 Bom. 457) the Bombay High Court held that so long as a company was on the register and it was carrying on business as a going concern it is impossible to say that any debt which it owes is necessarily irrecoverable and that to constitute moneys due by a company a bad debt or a business loss to the creditor it is necessary that the company should have ceased to be a going concern. This view appeared to us to be unsound and in commenting upon this case in 1932 (*vide* 1932 *Company Cases* Notes and Comments p. 93) we said :

"As a rule whether a debt is a bad debt depends on the facts of the case. . . . . . With all respect to their Lordships we doubt very much whether it can be laid down as an inflexible proposition of law that a debt due by a joint stock company cannot be a bad debt unless the company has ceased to be a going concern, though as a matter of practice it may be difficult for a creditor to prove, and for the Court to find, that a debt is bad where the debtor is a joint stock company which is a going concern."

We find that the Privy Council have now reversed the judgment of the Bombay High Court. Referring to the opinion expressed by the Chief Justice of Bombay their Lordships said: "Their Lordships know of no principle or authority upon which the view of the learned Chief Justice can be supported. Whether a debt is wholly or partly, and to what extent, bad is in every case (and whether the debtor is a human being or a joint stock company or other entity) a question of fact to be decided by the appropriate tribunal upon a consideration of the relevant facts of the case. There is no justification for the suggestion that a practice should prevail in the Commissioner's office under which a debt due from a limited company which is still a going concern is incapable of being treated as a bad debt."

The case has been remitted to India for a reconsideration of the question in the light of all relevant evidence. The view which we had expressed in *Company Cases* has thus been approved by the Privy Council and all doubts on the point have now been set at rest. [The judgment of the Privy Council is reported at p. 319 *infra.*]

Loss of Business Collections Through Dacoity.

A very interesting and important question affecting all businessmen in general was recently decided by the Lahore High Court in *L. N. Gadodia In re* [1934 I. T. R. 322]. The assessee was a piece-goods merchant. Some dacoits entered his office on a certain day with pistols and robbed the cashier of Rs. 14,400 while he was totalling the collections of the day. The assessee claimed that in computing his profits for the year this sum of Rs. 14,400 should be deducted. The Lahore High Court held that this was a capital loss; it did not fall within any of the deductions allowed by Section 10 (2) of the Indian Income Tax Act; and was, therefore, not liable to be deducted in computing the assessee's profits. Their Lordships have followed the decision of the majority in the case of *Ramaswami Chettiar* v. *Commissioner of Income Tax, Madras* [(1930) 53 Mad. 904] which was a case of theft of money from the strong-room of a banker during business hours. They have further laid emphasis on the fact that the assessee did not carry on money-lending business and that consequently the moneys could not be regarded as the assessee's stock in trade.

Businessmen, we dare say, would find it difficult to understand on what principle they are bound to include business collections lost by robbery during business hours, in the computation of the profits made by them during the year from their business. Is there any provision of law which goes so far as to compel an assessee to include business collections so lost in the computation of his profits? Though at first sight the Lahore decision may appear to be correct, we think the question requires deeper consideration. A loss of this nature is a loss occurring in the course of the business. It is so connected with the business that no businessman would include moneys so lost, in computing the profits earned by him in the business. If the piece-goods had been lost or destroyed by fire a deduction would

be allowed. The fact that the goods had been converted into money before the loss cannot make any difference in principle. The question is whether the loss is so connected with the carrying on of the business as to make the loss a loss in business. If bad debts can be allowed, if loss of stock through fire can be allowed, if the value of goods taken by a customer by fraud or forgery can be allowed, we see no reason why business collections lost during business hours by robbery or theft in the business premises could not be deducted in calculating the ultimate profits made in the business.

The case of loss of business collections is, in our opinion, a much stronger case for the assessee than loss of a banker's money (*Ramaswami Chettiar's case*) and the fact that the assessee did not carry on banking business, upon which so much emphasis has been laid in the judgment, does not, in our opinion, make the assessee's position worse in any way. Whatever be the nature of the business, if the collections of the day are lost in the course of carrying on the business, such collections must be excluded in any reasonable calculation of the profits of the business.

In this connection it is also important to bear in mind the principle that income tax is one tax and not a collection of taxes on different items of income and that the fact that the assessee might have made a profit by the sale of a particular item is quite immaterial. It is the profits that are ultimately made in the business that count.

The question in cases of this kind is not whether a deduction is allowable by any rule of law but one of calculation of profits and it is a fundamental rule that "the net profits of a business of a trade or business should be computed by reasonable business methods".

The test in such cases is, in our opinion, whether the loss occurred in the course of the business.

The question whether a particular loss occurred in the course of the business has to be decided on the facts of each case and the attendant circumstances—just as we determine, when considering a master's liability, whether the act was done or the injury occurred 'in the course of the employment' of the servant. There is no special sanctity attached to banking business in this

The distinction between capital loss and loss of income is to some extent misleading in this connection, for there is a loss only when capital is affected. It is clear that when bad debts are allowed we not only allow a deduction of the interest on the debt but also the capital that has become irrecoverable.

If a tax is to be levied on moneys so lost we would be taxing not moneys *earned* but moneys *lost* in business.

Bad Debts : Assessee's Right to Re-Agitate Decision of Income Tax Officer.

While re-affirming the principle laid down by the Privy Council in *Commissioner of Income Tax, C. P. and Berar* v. *Sir M. Chitnavis* [28 N. L. R. 205] the Lahore High Court has recently added a gloss to the rule, which is worth remembering. After referring to the rule, their Lordships said "We have only to add that the decision of the Income Tax Officer on the question whether a debt is bad or irrecoverable operates only for the particular year under assessment and it would be open to the assessee to repeat his claim in respect of any particular debt in any subsequent year, provided the debt had not been recovered in the interval." This must be so because the decision of the Income Tax Officer that the debt has not become bad refers only to the particular year of account under consideration. Whether it has become bad in a subsequent year is entirely a different question to be decided on different facts.

It may however be noted that if the decision of the Income Tax Officer is that the debt had become barred before the year of account, the assessee cannot re-agitate this question in subsequent years. The Lahore decision therefore applies only to cases where the Income Tax Officer holds that the debt has not yet become time barred. [The decision referrred to is *Rulia Mal Raunak Ram* v. *Commissioner of Income Tax* decided on June 22 by ADDISON AND SALE, JJ., and reported at p. 329, *infra*.]

Recent Decisions.

We have received reports of several interesting cases recently decided by the Lahore High Court. They will be fully reported and commented upon in our next issue.

NOTES AND COMMENTS.

Relief in Respect of United Kingdom Income Tax: Proposed Amendment of Section 49.

Recent increases in the Indian rate of Income-tax and the reduction in the British rate has created a position in which the effective rate of Indian Income-tax is greater in certain cases than the effective rate of United Kingdom tax. This has necessitated an amendment to Section 49 of the Indian Income Tax Act, and a bill (L. A. Bill No. 38 of 1934) was introduced in the Legislative Assembly on August 15, 1934. The object of the bill is stated fully in the following statement of objects and reasons:

" The scheme for relief from double income-tax between the United Kingdom and British India is based on the recommendation of the Royal Commission on income-tax to the effect that a doubly-taxed assessee should be granted relief to the extent of the lower of the two rates of tax, or, in other words, that he should pay in the aggregate the higher of the two taxes. This relief is granted partly by the United Kingdom and partly by British India. In accordance with Section 27 of the English Finance Act 1920, the United Kingdom grants a refund either (*a*) at a rate equal to one half the United Kingdom rate of tax or (*b*) at a rate equal to the Indian rate of tax, whichever is less. The relief given by British India is regulated by Section 49 of the Indian Income Tax Act 1922, which provides that where the relief obtained in the United Kingdom is at a rate less than the Indian rate of tax, the assessee shall obtain a refund to cover the difference subject to the maximum of one half the Indian rate of tax. This provision of the Indian Law effectively carried out the intention of the scheme so long as the Indian rate of tax was less than the United Kingdom rate. But owing to the recent increases in the Indian rate of taxation coupled with the recent reduction in the British rate of income-tax from 5s. to 4s. 6d. in the pound, a position has now arisen in which in certain cases the effective rate of Indian Income Tax is greater than the effective rate of the United Kingdom income-tax. In these cases, Section 49 as now worded has the effect of going beyond the original scheme

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for double income tax relief and of leaving the assessee after he has obtained refunds both in the United Kingdom and in India, liable to an amount of tax which is less than if he had been taxed singly at the higher rate. It has accordingly been decided to amend the Indian Income Tax Act 1922, so as to provide that when the income doubly-taxed has obtained relief in the United Kingdom, the balance of relief obtainable in British India shall not exceed the difference between the rate at which relief was obtained and the rate at which the tax was paid in that one of the two countries in which the rate of taxation was lower. This bill makes the necessary amendment."

The full text of the Bill is given below :—

A bill further to amend the Indian Income Tax Act 1922, for a certain purpose.

Whereas it is expedient further to amend the Indian Income Tax Act, 1922, for the purpose hereinafter appearing ; it is hereby enacted as follows :—

1. This Act may be called the Indian Income Tax (Amendment) Act, 1934.

2. In Section 49 of the Indian Income Tax Act, 1922,—

(*a*) in sub-Section (1),—

Amendment of Section 49, Act XI of 1922.

(*i*) after the words " between the Indian rate of tax " the words " or the appropriate rate of United Kingdom income tax whichever is less," shall be inserted ; and

(*ii*) the proviso shall be omitted ; and

(*b*) to sub-Section (2) the following clause shall be added, namely :

" (*d*) the expression 'appropriate rate of United Kingdom income tax' has the meaning assigned to that expression in Section 27 of the Finance Act 1920, as amended by the Finance Act, 1927 : "

Sir H. S. Gour's Income Tax (Amendment) Bill.

It will be remembered that Sir H. S. Gour had introduced a Bill in the Legislative Assembly in 1932 the main object of which was to provide for the constitution of special tribunals to control the assessment of income tax, and to hear income tax

appeals. [The text of the Bill is printed at pp. 6 and 7 of Vol. I, Income Tax Reports.] The subsequent history of the Bill appears from the following report of the Select Committee which was submitted on August 22, 1934 :—

" We the undersigned, the Members of the Select Committee to which the Bill further to amend the Indian Income Tax Act 1922, was referred, have considered the Bill and the papers noted in the margin, and have now the honour to submit this our Report, with the Bill annexed thereto.

2. The Committee held a preliminary meeting on the 4th day of March, 1933, at which the Honourable Finance Member explained the attitude of Government towards the Bill. Government, he said, could not accept the Bill in its present form, and found the balance of the opinions received on circulation of the Bill to be against it. At the same time Government recognized that there was a considerable volume of opinion in favour of the provision of some more extended form of appeal than was to be found at present in the Act, and if a satisfactory scheme could be devised which would not involve prohibitive expenditure or adversely affect collection of the tax, Government would be prepared to consider it sympathetically. Government could not agree to any alteration in income-tax collection procedure in the lower stages, and would insist on the re-circulation of the Bill even if an apparently satisfactory scheme for a new appellate authority was evolved.

3. A subsequent meeting of the Committee was held during the spring Session of the present year at which no further progress was recorded, but the Member in charge undertook to prepare redrafts of the Bill.

4. During the present Session a motion was made for the continuance of the Bill, and the Committee again met on the 10th August, 1934. At that and subsequent meetings an alternative draft of the Bill prepared by the Member in Charge was discussed. In the course of these discussions it became clear that no solution acceptable to both the Government and the authors of the Bill would be forthcoming and in these circumstances the latter had to recognise that there was small chance of any Bill being passed into law during the present Session. The

Government, however, stated that they were proposing to secure the services of one or more Income tax Experts from the British Inland Revenue Department in order to conduct an exhaustive examination of the Indian income tax system and that they would be fully prepared to call the special attention of these Experts to the opinions which had been expressed and the dissatisfaction which was felt at the absence of any outside appeal on questions of fact.

5. In the light of this assurance the Select Committee recommend that apart from the presentation of this report by the Member in Charge of the Bill no further motion on the Bill be made during this Session."

The Bill as amended by the Select Committee runs as follows :—

A Bill further to amend the Indian Income Tax Act, 1922.

Whereas it is expedient further to amend the Indian Income Tax Act, XI of 1922; it is hereby enacted as follows:

1. (1) This Act may be called the Indian Income Tax (Amendment) Act, 1932.

Short title, extent and commencement

(2) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas and applies also, within the dominions of Princes and Chiefs in India in alliance with His Majesty to British subjects in those dominions who are in the service of the Government of India or of a local authority established in the exercise of the powers of the Governor-General in Council in that behalf, and to all other servants of His Majesty in those dominions.

(3) It shall come into force at once.

Amendment of Section 5, Act XI of 1922. Cf S 54, Eng. Income Tax Act, 1918.

2. In Section 5 of the Indian Income Tax Act, 1922, (hereinafter referred to as the said Act, the following sub-sections shall be inserted, namely :—

"(7) There shall be constituted for each district or division or a specified area as the case may be a tribunal to control the assessment of income tax to hear all appeals against such assessment and generally to execute the Act.

(8) Such tribunal shall comprise a judicial officer not below the rank of District Judge, a member of the legal profession of not less than 10 years' standing appointed on the nomination of the District Bar Association, and where a High Court exists, upon the nomination of the High Court Bar Association and a member of the District Council or Municipal Committee appointed at a joint meeting of those bodies.

(9) Such tribunal shall decide all questions by a majority provided that it shall be competent to the tribunal or the majority of its members to refer any question for decision of the High Court.

Cf. Ss. 147 and 195, Eng. Income-tax Act, 1918.

(10) For the purpose of deciding any question referred to it for decision it shall be competent to co-opt any person specially conversant with the subject. Upon such co-option the person so co-opted shall become a member of the Court for the purpose of deciding the question referred to it of which it may take upon itself to decide."

3. In Section 23 of the said Act,—

Amendment of S. 23, Act XI of 1922.

(*i*) in sub-Section (1) after the words "If the Income-tax Officer" the words "with the occurrence of three or more assessors" shall be inserted; and

(*ii*) in sub-Section (2) after the words "If the Income-tax Officer" the words "with the occurrence of three or more assessors" shall be inserted, and

(*iii*) in sub-Section (3) after the words "Income-tax Officer" where they first occur the words "in the presence of three or more assessors if the assessee so desires" shall be inserted.

Amendment of S. 30, Act XI of 1922.

(4) In Section 30 of the said Act for the words "Assistant Commissioner," wherever they occur the words "Income-tax Tribunal" shall be substituted.

Amendment of S. 31, Act XI of 1922

(5) In Section 31 of the said Act, for the words "Assistant Commissioner," wherever they occur, the words "Income-tax Tribunal" shall be substituted.

(6) In Section 32 of the said Act,—

(1) in sub-Section (1),—

Amendment of S. 32, Act XI of 1922.

(a) for the words "an Assistant Commissioner" the words "Income-tax Tribunal" shall be substituted; (b) for the word "Commissioner" the words "High Court" shall be substituted.

(2) in sub-Section (3) for the word "Commissioner" the words "High Court" shall be substituted.

Amendment of S. 33, Act XI of 1922.

7. In Section 33 of the said Act for the word "Commissioner," wherever it occurs the words "High Court" shall be substituted.

8. In Section 37 of the said Act, for the words "Assistant Commissioner and Commissioner" the words "Income-tax Tribunal both General and Special and the High Court" shall be substituted.

9. In sub-Section (2) of Section 66 of the said Act, for the words "one hundred rupees" the words "fifteen rupees" shall be substituted.

Reference From Orders Made on Review: Act XVIII of 1933, Whether Retrospective.

The Income Tax (Amendment) Act of 1933 has extended the right to claim a reference to orders made by the Commissioner in the exercise of his powers of revision under Section 33 of the Income Tax Act. The question whether this provision is retrospective in effect so as to entitle an assessee to apply for a reference in respect of an order under Section 33 which was made before the Amending Act came into force, was raised in a recent case before the Lahore High Court, *Sheik Ata-ur-Rahman* v. *Commissioner of Income Tax, Punjab* [1934 I. T. R. 339] decided on the 5th July. An order under Section 33 was passed on September 1, 1933. The Amending Act came into force on September 11, and the question was whether the assessee was entitled to make an application to the High Court to require the Commissioner to state a case arising out of the order. It was contended on behalf of the assessee that the matter was one of mere procedure and the Amending Act had therefore retrospective effect. Their Lordships overruled the assessee's contention and held that no application lay. It is well settled that statutes which relate to mere procedure are retrospective in operation but

their Lordships held, relying on the decision of the Judicial Committe in *Delhi Cloth and General Mills Co., Ltd.*, [I. L. R. 9 Lah. 284] that the right to claim a reference was not a mere matter of procedure and the Amending Act of 1933 had therefore no retrospective operation.

Privilege as to Documents Produced Before Income Tax Authorities.

Section 54 of the Income Tax Act provides that notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall be entitled to require any public servant to produce before it any return, accounts, documents or record or any part of any record produced under the provisions of the Income Tax Act, or to give evidence before it in respect thereof. In a recent case before the Lahore High Court a party wanted to summon some income tax officers to prove that certain books had been produced before them contending that the privilege conferred by the section was confined to evidence of the contents of the documents produced. The Commissioner refused to afford facilities for their examination, The High Court held that the section was wide enough to exclude evidence to the effect that certain account books had been produced before the income tax authorities and that the Commissioner was right in claiming privilege under the section.

Assessment of Pooling Associations.

Assessment of associations formed for the purpose of 'pooling' profits with the object of avoiding competition between the members of the associations raises questions of great difficulty. Is there 'an association of individuals' within the meaning of the Income Tax Act, in such cases or a mere agreement between certain persons to refrain from doing certain acts and to share their profits in certain ways. Again, granting there is an association, does it carry on a business? These questions were recently raised before the Commissioner of Income Tax, Punjab in the case of the *Lahore Ice Factories Association* (1934 I.T.R. 362) and the High Court has directed the Commissioner to refer the questions to it for decision.

The nature of such combinations was considered also in another case of the Lahore High Court *Madan Gopal* v. *Shewal Dass* (1934 Comp. Cas. 339) in which the learned judges held

that the association which they had to consider did not carry on any business. Perhaps the correct way of approaching the question is not to search for a general rule applicable to all such combinations. Whether there is an association and whether the parties carry on business will depend on the facts of each case and the construction and effect of the particular agreement in question.

English Companies: Relief in Respect of Indian Income Tax.

The decision of the Court of Appeal of England in *Assam Railway and Trading Co. Ltd.* v. *Inland Revenue Commissioners* [1934 I.T.R. 9] has been affirmed by the House of Lords on July 24. The facts of the case were briefly these. The income of the Assam Railways Co., for a certain year was £ 186,808. In assessing the company to income tax in India, the revenue authorities of India allowed a deduction of a sum of £ 42,500 odd which the company had paid as interest on debentures, and levied income tax on £ 129,365. Under the English law the company was not entitled to claim any such deduction, and the question was whether the company was entitled to relief under Section 27 of the English Finance Act in respect of £ 186,808 or only in respect of the income on which tax had been paid in India, namely, £ 129,365. The Court of Appeal, affirming Finlay, J., held that only that part of the income which had suffered dual taxation, namely, £ 129,365, can be relieved. The House of Lords (Lords Blanesburgh, Warrington, Atkin, Thankerton and Wright) affirming the decision, said that on the true facts of the case certain definite parts of the income which were taxed in the United Kingdom were excluded from taxation altogether in India so that the element of double taxation did not exist at all in regard to those parts of the appellants' income and that it was only in respect of the part of the income on which they had paid double tax that the tax-payer was entitled to relief under Sec. 27 of the Finance Act.

NOTES AND COMMENTS.

Assessment of Profits Paid to Partners on Dissolution of Partnership.

The judgment of the Madras High Court in *Commissioner of Income Tax, Madras* v. *P.R.A.L.M. Muthukaruppan Chettiar* [1934 I.T.R. 406] deals with a question of very great importance to businessmen on the one hand and the Crown on the other and if the decision is right it is sure to affect the revenue a good deal. The gist of the decision is that where a retiring partner is paid his share of the capital and profits, he is not liable to be assessed to income-tax on any portion of the amount paid to him. In their Lordships' view, on the dissolution of a partnership the capital and profits of the firm become consolidated into capital for distribution amongst the partners and the amount received by the retiring partner is a capital receipt. In the case of a limited company which is being wound up it has been held that undistributed profits paid out to shareholder as surplus assets is not taxable [*Burrel's case*: 9 Tax Cas. 27] and this principle is, in their Lordships' opinion, applicable to partnerships. We feel considerable doubt as to whether this principle relating to the distribution of undistributed profits of a limited company in liquidation can be applied to partnerships, *first* because so far as the shareholders are concerned a limited company has the right to determine how much of the income shall be reserved as capital and how much shall be distributed as profits to the shareholders and no shareholder is entitled to treat any income as profits until the company has declared it as such, and *secondly*—a matter to which we attach great importance—the commencement of liquidation puts an end to the power of the company to declare undistributed profits dividends. As LINDLEY, J., has observed in *In re Armitage* [1893, Ch. 337 at p. 346] the moment a company gets into liquidation 'there is an end of all power of declaring dividends'. The only thing that the liquidator has to do is to turn the assets into money and divide the money among the shareholders in proportion to

their share. Dissolution of a partnership stands on an essentially different footing. None of these considerations apply. Accounts up to the date of dissolution are taken, the capital invested by each partner and interest thereon are calculated, each partner's share in the profits is ascertained and each is paid his share of the capital and interest, and the share of the profits is paid to him as such. It is difficult to see how the share of profits so paid out to him can be exempt from income-tax. If the view of the Madras High Court is correct, if partnerships are dissolved at the end of each year and renewed, the partners would not be liable to pay tax on the profits that they distribute amongst themselves at the end of each year. Tax on profits can also be avoided if the partners agree to reserve the ascertainment and distribution of profits to the termination of the partnership, taking loans from the firm in the meanwhile.

Cases in which the question whether, when the accumulated profits of a company are capitalised and then distributed to the shareholders in the form of new shares, the income thus received is assessable to income-tax throw some light on the question. If a company capitalises the income and issues new shares, leaving no option to the shareholder to demand the dividends, the income is not taxable; but if there is an option to demand the profits in cash and cash is taken, the income is taxable: [*Coke's case*, 1906, 2 K.B. 246]. On the commencement of winding up the profits are capitalised by operation of the law as the power to declare dividend ceases. Again, as COUTTS TROTTER, C.J., has said in *Commissioner of Income Tax* v. *Binny & Co.* [I.L.R. 47 Mad. 837; 1 I. T. C. 358] "you cannot say that there is a notional payment of a dividend to a shareholder when the position is that, if he sued for it, his action must be dismissed, that is to say, when the whole conception that he is entitled to the dividend is one that the law refuses to countenance."

We do not think there is sufficient justification in principle or authority for extending the rule of capitalisation of undistributed profits which is applied to limited companies in liquidation, to ordinary partnerships which are proposed to be dissolved. At any rate, the rule cannot be applied where the partners actually take an account of the capital and profits and

divide the profits as such amongst themselves as in *Muthukaruppan Chettiar's case.*

False Statements in Return.

If a person knowingly makes any false statement in a return of his income submitted to an Income Tax Officer in pursuance of a notice served on him under Section 22 (2), Income Tax Act, he is clearly guilty of an offence under Section 177 of the Indian Penal Code. The Lahore High Court has held that if a return containing false statements was made before the receipt of any notice under Section 22 (2), the person making the return cannot be convicted under Section 177 of the Indian Penal Code: See *Hari Chand* v. *Emperor* [1934 I.T.R. 336, September issue]. The reasoning on which this decision is based is that until a notice is served on the assessee he is not legally bound to furnish any information about his income and he is not therefore guilty of any offence under Section 177, Indian Penal Code. With all respect to the learned Judge who decided this case, we think that though a person may not be bound to make any return if no notice has been served on him, if he does make a return the fact that no notice had been served is no defence to a prosecution for having made a false statement. His Lordship's attention does not appear to have been invited to Section 52 of the Income Tax Act. If Section 177, Indian Penal Code, stood alone and there was no provision such as that contained in Section 52 of the Income Tax Act, the decision would have been correct. But Section 52 clearly provides that "If a person makes a statement in a verification metioned in ....Section 22...which is false and which he either knows or believes to be false or does not believe to be true *he shall be deemed to have committed* the offence described in Section 177 of the Indian Penal Code." This section, we think, is clear and renders the question whether the person was legally bound to furnish information, irrelevant.

Judicial Committee on the Assessment of Successors to Business.

The decision of the Judicial Committee in *Maharajadhiraj of Darbhanga* v. *Commissioner of Income Tax, Bihar and Orissa* [1934 I. T. R. 345] removes certain doubts that arise on the

interpretation of Section 26 (2) of the Income Tax Act. The sub-section provides that 'Where at the time of making an assessment under Section 23 it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person the assessment shall be made upon such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits of that year.' It was argued on behalf of the assessee in this case that the sub-section was confined to cases where the predecessor could himself have been assessed under Section 23, and that if a person dies before he has submitted a return and before the period for filing the return has expired, his successor cannot be assessed under Section 26 (2). Their Lordships held that 'assessment' did not mean the definite act of making an order of assessment. The words 'at the time of making an assessment' meant 'in the course of the process of assessment' and inasmuch as in the case before their Lordships notice had been duly served on the late Maharaja before his death, the process of assessment had begun and his successor could be rightly assessed under Section 26 (2).

The second argument that Section 26 (2) was confined in its application to succession *inter vivos* and does not apply to cases of succession on death was also rejected by their Lordships.

Appeal to Privy Council From Order Refusing to require Commissioner to State Case: Allahabad View.

In *Feroz Shah* v. *Commissioner of Income Tax, Punjab* [1933 I.T.R. 219; I.L.R. 14 Lah. 682] the question whether an appeal lies to the Privy Council from an order of a High Court refusing to require the Commissioner to state a case to the High Court was raised before the Judicial Committee, but their Lordships refrained from answering the question as the case failed on the merits. The Board however made this remark: "The objection is a serious one. Admittedly such an appeal as the present is not authorised by the Income Tax Act itself. If open at all, it must be justified under Clause 29, Letters Patent......as being an appeal from 'a final judgment, decree or order made in the exercise of the original jurisdiction' by a Division Bench of the Court."

The Allahabad High Court had recently to consider the question in *Gurmukh Rai* v. *Secretary of State for India in Council* [1934 I.T.R. 412] and their Lordships SULAIMAN, C. J., and BAJPAI, J., after a review of the earlier decisions, have followed the decision in *E. M. Chettiyar Firm* v. *Commissioner of Income Tax, Burma* [I.L.R. 8 Rang. 435] and answered the question in the negative. The Lahore High Court has taken a different view in *Feroze Shah's case* [I.L.R. 12 Lah. 166.]

It is however important to note, that Section 66-A (5) of the Income Tax Act specially preserves the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council and the assessee can therefore, apply to their Lordships of the Privy Council for special leave.

Solvent Partner's Right to Set off Entire Loss in Partnership.

A very important question which may often arise in the assessment of partners was decided by the Madras High Court in *Commissioner of Income Tax, Madras* v. *Rm. Ar. Rm. Arunachalam Chettiar and Son* [1934 I.T R. 401]. The assessee was the sole owner of a money-lending business and the capitalist partner in a cotton trade. The cotton trade failed and was closed down, and the assessee had to bear the entire loss, as his partner was a man of straw. The assessee was allowed to set off his own share of the loss but was not allowed to set off against his other income his partner's share of the loss in the cotton trade which he had to bear. The evidence showed that the cotton business was closed down in March 1930, on April 1, 1930 the debit in the cotton trade accounts against the partner was transferred to the assessee's accounts, the debt was written off as irrecoverable in March 1931 and the assessee claimed a deduction in respect of the amount thus written off. The claim was rejected by the Commissioner as a capital loss. The High Court upheld the decision of the Commissioner that the claim for set off could not be allowed, though for different reasons. The learned Chief Justice has pointed out that a claim for deduction can be made in two ways, as a loss in business or as

a bad debt. The claim could not be allowed as a loss in business inasmuch as the assessee's share of the loss was shown separately in the accounts and his partner's share of the loss was not assessee's loss. As regards treating the claim as a bad debt, his Lordship said as follows: "There is no bad debt owing by Somasundaram Pillai (the assessee's partner in the cotton trade) to the money-lending business. The money-lending business never lent any money to Somasundaram Pillai. If it had lent money to Somasundaram Pillai and that had proved to be a bad loan, then the assessee's money-lending business could rightly have claimed to set it off against the profits and gains of the money-lending business. In fact this was nothing more than a lending by the money-lending business of money to the cotton business and not to Somasundaram Pillai. What had happened since the business closed down is that Somasundaram Pillai has become a debtor of the assessee and a bad debtor of the assessee. He is not and never was a debtor of the money-lending business at Perambalur."

With all respect and in spite of our most anxious consideration of the question we find it difficult to follow the judgment. On the first aspect of the question, it is clear that a partner is liable under the Indian law, jointly and severally with his other partners for all the debts of the firm. Section 25 of the Indian Partnership Act, 1932, following Section 43 of the Indian Contract Act, provides that "Every partner is liable, jointly with all the other partners *and also severally* for all the acts of the firm done while he is a partner." Where a partnership ends in a loss each partner is liable to pay the entire debts. And if one of them is a bankrupt and the other partner has to bear all the loss, we see no reason why he should not be allowed to claim the entire loss as his loss in the business. On the other hand, if a partner pays his co-partner's share of the loss treating the amount he thus pays as a loan to the latter, and subsequently the debt becomes irrecoverable, there is no reason why it could not be treated and deducted as a bad debt. The fact that the debt is in such cases a debt due to the assessee and not a debt due to the money-lending business (of which the assessee is the sole owner), would not in our opinion, make any difference, even assuming that this is the true legal position,

The decision of the Judicial Commissioner's Court of Sind in *Commissioner of Income Tax, Bombay* v. *Khemchand Ramdas* [1933 I.T.R. 311] may usefully be referred to in this connection. The facts of the case were very similar. The assessee carried on business at several places. There was a loss in the business which he carried on at Bunder Abbas in which he had a working partner. He settled accounts with his partner. It was found that the latter had to pay Rs. 36,134 as his share of the loss in the business. The assessee obtained a document from his partner by which the latter agreed to pay this amount in instalments. Three of such instalments had to be written off as bad debts and the assessee's claim for deduction of the amount thus written off from his other income, was allowed. The learned judges said: "In the present case the assessee is being taxed personally and it is open to him to say that on a settlement of accounts of the old partnership, he treated the amount due by Lokumal (the working partner) as a loan made by him personally to Lokumal and that the loss which he consequently sustained on account of the failure of Lokumal to pay back the loan is a loss which he is entitled to claim credit for in assessing the profit which he has made in respect of all kinds of business carried on by him in the year of assessment." We think this represents the better view. The fact that the assessee is the capitalist partner would not make any difference and it may be noted that though the Commissioner's decision in *Arunachalam Chettiar's case* was based on this fact, the judgment of the High Court is not grounded on any such distinction. However, so far as the Madras Presidency is concerned, the decision of the High Court in *Arunachalam Chettiar's case* is binding and in view of this decision a person who has to bear his ex-partner's share of the loss owing to the latter's inability to pay, is not entitled to set off this loss against his other profits and gains. The question does not appear to have come before the other High Courts for decision.

Mercantile System of Accounting and Assessment of Unrealised Interest.

It is now well settled that interest which has merely accrued due but has not been received by the creditor cannot be taxed, and that the execution of a promissory note or bond to the creditor for the interest which has accrued due would not make

any difference. The Lahore High Court has in a recent case drawn a very important distinction in this respect between cases where the accounts are kept on cash system and cases where the accounts are kept in the mercantile system: [Vide *Ahmad Din* v. *Commissioner of Income Tax, Punjab* (1934 I.T.R. 369)]. In this case the method of accounting employed by the assessee was the mercantile or book profit system, under which entries are made in the account on the date not of the receipt of the money or expenditure of money but on the date of the transaction irrespective of the date of cash payment and a profit and loss account is prepared on this basis. According to this method the assessee regularly entered in his profit and loss account interest which was not actually received. The Commissioner held that as the assessee had adopted this system and treated interest which had not been actually received as received for purposes of profit and loss account he cannot be allowed for purposes of assessment to income-tax to claim a deduction of interest so credited in the accounts on the ground that it had not been actually received; and the High Court upheld this view. The remedy of the assessee if the interest becomes irrecoverable subsequently, is to claim a deduction of the amount as a bad debt.

If the decision is right the keeping of accounts on the mercantile system is decidedly disadvantageous to assessees, for it is certainly unwise to follow the roundabout course of paying income-tax on unrealised income first and then claiming a deduction when the debtor becomes unable to pay, especially when, as the law now stands, the income-tax authorities are the sole arbiters as to when a debt has become irrecoverable and whether it has become irrecoverable. The course suggested, namely, of treating unpaid interest as paid and subsequently claiming a deduction of the same as a bad debt if the debtor is unable to pay, is also somewhat anomalous in law. Once a debt is paid it is extinguished. How can it be treated as a debt or a bad debt subsequently? Unless there has been a novation with the consent of both parties a new debt cannot come into existence. The fact that the assessee keeps his accounts on the mercantile basis cannot create a new debt. The real test appears to be not whether the basis of accounting is cash or mercantile but whether there has been a real receipt of interest—receipt in cash, in kind or by adjustment.

NOTES AND COMMENTS.

Assessment of Profits of Money-Lender Who Takes Over Debtor's Property in Satisfaction of Debt.

The practice followed by the income-tax authorities in assessing the profits of a money-lender who has been compelled, owing to the inability of the debtor to pay, to take over his debtor's lands in satisfaction of the moneys advanced to him has not been quite uniform. In some cases the assessment is postponed until the money-lender re-sells the land. In other cases a portion of the value of the properties is allocated for interest on the loan and this amount is taxed in the year in which lands are transferred and the question whether income tax is payable in respect of the receipt of the land to the extent to which the value thereof exceeds the principal advanced is held in suspense until the lands are sold. There is also considerable doubt as to whether the criterion of the value of the lands transferred is the amount of the debt in satisfaction of which the lands are made over or the actual value of the lands on the date of transfer; and revenue authorities sometimes insist on appropriating the value of the lands in the first instance to interest on the debt.

A practical method of assessing the profits in such cases and the procedure to the followed by income-tax authorities are laid down by the Rangoon High Court (PAGE, C.J., BAGULEY and BA U, JJ.) in *Commissioner of Income Tax, Burma* v. *P. L. S. M. Concern* (reported in the October number of *Income Tax Reports*, 1934 I.T.R. 417). The rules laid down in this case may be summarised as follows:—

First, the amount of debt in satisfaction of which the lands are transferred is not a criterion of the value of the lands taken over, but in each case the income-tax authorities must make an estimate of the real value, in the accounting year, of the lands transferred (unless the lands have been sold by the assessee in the accounting year.) And in making an estimate of

the value, while the assessees are not bound by the figure at which the lands are entered in their account books, the income tax authorities are also not bound to accept the assessees' estimate of the value, though the value of the lands as set out in the assessees' books may be treated as *prima facie* evidence of their true value.

Secondly, if the estimated value of the lands in the accounting year was greater than the principal sum that was lent, the income tax authorities would be entitled to treat the balance after deducting an amount equivalent to the loan, as representing profits and gains accruing from the transaction and to assess the same as income chargeable with income tax. On the contrary, if the estimated value of the lands was less than the amount of the principal sum that had been lent, no tax would be chargeable in the accounting year in which the lands were transferred, although it may be that the estimated value of the lands in that year exceeds the amount due to the assessees in respect of interest on the loan.

Thirdly, inasmuch as the assessment of the lands in this way is based on what must necessarily be a mere estimate of the lands it would be fair and reasonable that an adjustment of the assessment should be made in the accounting year in which the assessees sell the lands, when it would be possible finally to ascertain whether or not in respect of the transaction a profit chargeable to income tax had accrued to the assessees. Until the sale takes place the final adjustment of the assessment must necessarily remain in suspense.

This decision lays down a workable method which income tax authorities can safely follow in cases of this nature. The first two propositions are also founded on sound principles, namely, (i) that entries in the assessee's books are not conclusive evidence of profits, income tax authorities being bound in each case to ascertain as a fact what the real profits are (*Sun Life Insurance* v. *Clark*, 6 Tax Cas. 59) and (ii) that where assets are accepted in adjustment of the whole indebtedness of the debtor there is no scope for the presumption that it is to the creditor's advantage to attribute payments to interest (*per* LORD MACMILLAN in *Commissioner of Income Tax* v. *Maharajadhiraj of Dharbhanga*, 1933 I.T.R. 94 at 108). On the third proposition

we feel some doubt as to whether the Indian Income Tax Act contemplates a preliminary assessment in the year of transfer and a final assessment in the year when the properties are resold. But whether the two assessments are to be viewed as preliminary and final or as two distinct assessments in the eye of the law, this distinction is not very material for practical purposes and the procedure laid down by PAGE, C. J., does not seem to be open to any objection on this score.

As a well-defined and uniform practice is desirable in cases of this nature we would invite the attention of Commissioners of Income Tax and the subordidate income tax authorities to this important judgment of the Rangoon High Court and the rules laid down therein.

Partition of Hindu Undivided Families.

The judgment of the Lahore High Court in *Saligram Ramlal* v. *Commissioner of Income Tax, Punjab* (1934 I. T. R. 448) deals with a very important question relating to the assessment of joint Hindu families. Section 25-A of the Income Tax Act provides that if at the time of making an assessment it is claimed by or on behalf of a member of a Hindu family that a partition has taken place among the members of such family the Income-tax Officer shall make such inquiry thereinto as he may think fit and that if he is satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or group of members in definite portions he shall record an order to that effect. Under the Hindu law a mere severance of status amounts to a partition and, as the word partition is not defined in the Income Tax Act, the question naturally arises whether the partition contemplated by Section 25-A includes a partition effected by a mere declaration of severance of status without a division of the joint property by metes and bounds.

This question was raised before the Lahore High Court in 1933 in *Sher Singh Nathu Ram* v. *Commissioner of Income Tax, Punjab* (1933 I. T. R. 287) and the learned Judges (JAILAL and MONROE, JJ.) before whom the case came on for hearing, being of opinion that the question was an important one, referred it to a Full Bench. In a recent case, the same question was raised

before ADDISON and SALE, JJ. in *Saligram Ramlal* v. *Commissioner of Income Tax, Punjab* (1934 I.T.R. 448) and the learned Judges held that the words of Section 25-A clearly contemplate an actual partition by metes and bounds and declined even to direct the Commissioner to state a case to the High Court on this question. The learned Judges said:

"The principal contention before us was that Section 25-A did not contemplate an actual partition by metes and bounds of the joint family property. It seems to us that it is impossible so to hold. If actual partition had not been contemplated the clause, 'and that the joint family property has been partitioned among the various members or groups of members in definite portions' would not have been added to the section; for the clause immediately preceding it would be sufficient if the law was that actual partition of the property was not necessary . . . The words are clear and it is impossible to hold that the legislature added the second clause without intending that it should have a meaning."

'Hindu Undivided Family': Whether Includes Jain Families.

Though the religious beliefs and rites of Jains differ to a large extent from those of Hindus, it has been settled by a series of decisions that Jains must be presumed to be governed by the Hindu law in the absence of evidence establishing a custom or usage to the contrary. Following these decisions the Judicial Commissioner's Court of Nagpur has held that the term 'Hindu undivided family' in the Indian Income Tax Act includes Jain undivided families: *Nathu Sah* v. *Commissioner of Income Tax, C. P. and Bear* (1934 I.T.R. 463).

'Hindu Undivided Family': Whether Includes Single Male Member Living Jointly with Widows of Deceased Coparceners.

The important question whether a Hindu family consisting of a single male member and widows of deceased co-parceners is a 'Hindu undivided family' within the meaning of that expression as used in the Indian Income Tax Act was referred to the Court by the Commissioner of Income Tax, Central Provinces in *Nathu Sao* v. *Commissioner of Income Tax, C. P. and Berar* (1934 I. T. R. 463). As widows are not entitled

to any share in the family property but only to maintenance the term 'undivided family' is to some extent inappropriate to such a family, but as observed by SIR V. RAMESAM in *Vedathanni* v. *Commissioner of Income Tax* [1933 I. T. R. 70 ; I. L. R. 56 Mad. 1] "so far as the Hindu law is concerned, there is little scope for any doubt......There can be a joint family with a single member provided there are other members entitled to maintenance from the estate." The learned Judicial Commissioners have rightly held following this case that where a single Hindu male lives jointly with the widows of deceased co-parceners there is an 'undivided family' within the meaning of the Income Tax Act. The question whether a family continues to be a family when all the co-parceners and their wives die leaving only a single male member is a more difficult one and does not appear to have come up for decision before the Courts.

Casual and Non-recurring Receipt and Income distinguished.

SIR GEORGE LOWNDES in defining the meaning of the word 'income' said : "Income, their Lordships think, in this Act, connotes a periodical monetary return 'coming in' with some sort of regularity or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall." A good example of a windfall which does not fall within the definition of income is to be found in the case of *Commissioner of Income Tax* v. *R. Johnstone* [1934 I.T.R. 390]. Certain workmen expected on the termination of their service a gratuity from the company whom they served. The company went into liquidation and a rich man who was interested in the company paid these workmen the gratuity which they had expected from the company. The Rangoon High Court held, following the principle laid down by the Privy Council in *Commissioner of Income Tax* v. *Shaw Wallace & Co.* [1932, 36 C.W.N. 653] that the money so received was not income from other sources within Section 6 (*vi*) of the Income Tax Act but a receipt in the nature of a windfall and that it was exempted by Section 4 (3) (*vii*) of the Act from income-tax.

For a case on the other side of the line reference may be made to *Commissioner of Income Tax* v. *R. Panchapakesa Iyer* [137 I.C. 557 ; 62 M.L.J. 656]. In this case an Assistant Engineer in Government service was compulsorily retired from service. As a result of petitions made to the Government, he was given compensation in a lump sum for having been compelled to retire before he should normally have retired. It was held that the amount was income falling within the definition of 'salary' in Section 7 (*ii*) and was assessable to income tax.

DEDUCTION OF PARTNER'S SALARIES.

HEASTIE *v.* VEITCH & CO.

The decision of the Court of Appeal of England (LORD HANWORTH, M.R., SLESSER L. J., and ROMER, L. J.,) in *Heastie* v. *Veitch & Co.* [1934 I. T. R. 456 ; 103 L. J. K. B. 492] throws much light on the vexed question when payments made by a partnership to a partner can be deducted in computing the profits of the partnership. In this case the question was whether rent paid to a partner in respect of premises let by the partner to the firm can be deducted. The Court of Appeal held that such rent is deductible, reversing the judgment of FINLAY, J. This is, as LORD HANWORTH said, a very plain case even in England and much more so under the Indian Act which, unlike the English Act, allows deduction of interest on borrowed capital.

PARTNER'S SALARIES.

The question whether salaries paid to a partner for services rendered by him can be deducted is a more difficult one. The opinions expressed in the judgments delivered in *Heastie* v. *Veitch & Co.* on this point are very instructive : FINLAY, J., said :

"I put it to Counsel who assented—and I do not imagine it can be disputed—that if you have a salaried partner, that salary is not a deduction before computing the profits of the partnership, although it is otherwise, of course, if it is the case of a company paying salaries to its servants and officials."

LORD JUSTICE SLESSER said :

"With regard to salaries, those are the cases, as I understand, where it is held that the partner cannot be treated as

receiving a salary where money is paid to him in respect of the partnership business in one form or another. I am far from saying that, if a payment were made to a partner for something altogether disconnected with the partnership business as such, he might not be entitled strictly to remuneration on an independent contract."

Again, ROMER, L. J., said as follows:

"Where two persons agree together to carry on a business or a profession in partnership, it is no more possible, in ascertaining the profits of that business or partnership for purposes of Schedule D, to deduct the salary paid to one or both of them for the work they have done in carrying on that business than it would be for a professional man to carry on a business on his own account and by himself to deduct something which he thought was equivalent to the value of his services rendered to himself. But it is not the fact that you can never, in ascertaining the profits of a partnership, deduct something paid to one of the partners. An illustration I ventured to give during the argument is this: suppose two people are carrying on business in partnership as hotel proprietors, and it is necessary for the purpose of carrying on that hotel, that business, that they should be supplied from time to time with wine, and suppose one of the partners is carrying on a wholly independent business on his own account in the wine business and supplies wine to the partnership, it would be idle to suggest, would it not, that for the purpose of ascertaining the profits of the hotel you could not deduct the sums paid to the partner who was the wine merchant? The fact that such a deduction would be permissible is, I think, made clear by Rule 10 of the rules applicable to cases I and II which says that for the purposes of taxation under Schedule D a partnership is treated as a separate entity from individual partners composing the firm."

INDIAN CASES.

In India the question of partner's salaries has been considered in three cases, *viz.*, *Commissioner of Income Tax, Madras* v. *B. S. Mines & Co.* [1 I.T.C. 176]; *Ramakrishna Ramnath* v. *Commissioner of Income Tax, Central Provinces and Berar* [4 I.T.C. 171; 139 I.C. 290] and *Electric & Dental Stores* v. *Commissioner of Income Tax, Punjab* [I.L.R. 12 Lah. 663;

134 I.C. 198]. In the first case it was held, on the facts stated, that the drawings of partners were part of the profits and therefore taxable by whatever name they were described.

In the second case it was observed that a partner might conceivably do business in his individual capacity and in that capacity might render services to the firm in consideration of which the firm might pay him a remuneration which would be a legitimate deduction from the assessable income of the firm. But on the fact it was held that there was no such arrangement and the claim for deduction was disallowed. In the last case a learned Judge of the Lahore High Court, quoting from SUNDARAM'S *Law of Income Tax*, stated the principle in terms which are somewhat more liberal to the assessee thus: "If however, a particular partner or partners possess special qualifications for which they are paid a salary irrespective of the existence of profits and over and above their share of profits the salaries could be allowed as a deduction."

THE TRUE TEST.

In view of the observations which have been made by their Lordships in *Heastie* v. *Veitch & Co.*, it is doubtful whether even if a partner possesses special qualifications, remuneration paid to him *for carrying on the partnership business* can be claimed as a deduction. The correct test appears to be not whether the partner had special qualifications but whether the services rendered by him were rendered in the course of a business which is independent of the partnership—whether the work was done in the capacity of a partner or in an independent capacity.

Income Tax Sessions of the Madras High Court.

SIR OWEN COMPTON BEASLEY, C. J., SIR V. RAMESAM, J., and KING, J., of Madras High Court sat recently to hear income tax cases. Their Lordships granted leave to appeal to the Privy Council from their decision in *Rm. Ar. Rm. Arunachalam Chettiyar's Case* [1934 I. T. R. 401] in which it was held that a partner was not entitled to set off against the profits earned by him his ex-partner's share of loss in partnership business which he had to bear owing to the latter's inability to pay. The question whether a gratuity paid to an employee of a company, after his retirement, under the Provident and Gratuity Funds Rules of the company was assessable under Section 7 (1) of the Indian Income Tax Act was easily answered in the affirmative in *Balaji Row* v. *The Commissioner of Income Tax* [O. P. No. 207 of 1935] and the principle laid down in *The Mylapore Permanent Fund Case* [I.L.R. 47 Mad. 1] and affirmed in *The Madura Hindu Permanent Fund Case* (I.L.R. 56 Mad. 415; 1933 I.T.R. 46) with regard to guaranteed interest paid to the members of mutual benefit societies, which as the Chief Justice observed had become rather unpopular with the revenue authorities, was re-affirmed in the *Sri Meenakshi Nidhi Ltd.* There was also a long discussion of what constitutes a ' business ' and the difference between a separate business and a branch in the case of the *South Indian Industrials Ltd.* Throughout the sittings even a casual observer would have been struck by the unostentatious learning and experience of the Chief Justice and his Lordship's patience in hearing the arguments of counsel and eager desire to do real justice.

Rents Received by Usufructuary Mortgagee Towards Interest.

Their Lordships delivered judgment on December 13 in the case of *Hajee Mahomed Sadak Koyee Saheb* v. *Commissioner of Income Tax, Madras*, in which the question was whether rents collected by a usufructuary mortgagee and appropriated towards

the interest due on the loan was agricultural produce and exempt from tax as such. Their Lordships held that such income was agricultural income, though it was credited, on receipt, towards the interest due on the mortgage debt. It was further held that the fact that a particular rate of interest was mentioned in the mortgage deed did not make any difference in principle. The cases of *Commissioner of Income Tax* v. *Ibrahimsa Rowther* [I.L.R. 51 Mad. 455], In re *Mukund Sarup* [I.L.R. 50 All. 496] and *Commissioner of Income Tax, Bihar and Orissa* v. *Maharajadhiraj of Darbhanga* [1934 I.T.R. 107 ; A.I.R. 1934 Pat. 178] were referred to in the judgment.

Assessment of Subjects of Mysore Residing in Civil and Military Station, Bangalore.

In *Chinnaswami Mudaliar* v. *Commissioner of Income Tax, Bangalore Cantonment* which was decided on December 10, the question was whether a subject of the Mysore State residing in the Civil and Military Station of Bangalore could be assessed to income tax at the rates applicable to residents in British India in view of the fact that the Finance Act had not been introduced to the C. & M. Station by any order or notification of the Governor-General in Council. Their Lordships held that Section 3 of the Indian Income Tax Act as in force in the C. & M. Station enabled the income tax authorities to levy tax on residents in the Station at the rates fixed in British India.

Right to Let off Loss in Business Which Has been Closed Down Against Other Income.

Another question which is of far-reaching importance to businessmen, namely, whether when one of the several businesses carried on by a company is closed, the company can claim a set off against its income from the other businesses, losses and expenses incurred in connection with the business that had ceased to function in the year of account (*e.g.*, interest on borrowed capital, depreciation of machinery etc.,) was answered in the negative in the *South Indian Industrials Ltd.* v. *Commissioner of Income Tax* (decided on December 12). The exact scope and effect of this decision will be considered later on,

Partition of Hindu Undivided Families: A Full Bench Ruling.

Judicial opinion on the very important question whether Section 25-A of the Indian Income Tax Act (which provides for assessment of Hindu undivided families after partition) contemplates partition by metes and bounds or mere separation in status without actual partition is becoming quite unsteady. It was only in the November issue of our *Reports* that we reported and commented upon the case of *Saligram Ramlal* v. *Commissioner of Income Tax, Punjab* (1934 I. T. R. 448), in which ADDISON and SALE, JJ., dismissed an application to require the Commissioner of Income Tax to refer this question to the High Court on the ground that the words of Section 25-A were clear and that it was impossible to hold that the legislature added the second clause in Section 25-A (*viz.*, ' and that the joint family property has been partitioned among the various members or groups of members in definite portions ') without intending that it should have a definite meaning. Their Lordships were unhesitatingly of opinion that Section 25-A contemplates a partition in which there is not only a division in status but also a partition by metes and bounds.

When this question was raised before JAILAL and MONROE, JJ., on an earlier occasion the learned judges said that it was an important one and that it was desirable that the case should be heard by a Full Bench. [See *Sher Singh Nathu Ram* v. *Commissioner of Income Tax* (1933 I. T. R. 287)]. The Full Bench have now expressed their opinion in *Sher Singh Nathu Ram's Case* (see p. 479 infra), but the answer given is quite different. It is a matter for regret that the fact that the question had been raised in *Sher Singh Nathu Ram's Case* and referred to a Full Bench was not brought to the notice of the judges who decided *Saligram's Case*. Nor is *Saligram's Case* overruled or even referred to by the Full Bench.

The Decision of the Full Bench.

The opinion of the Full Bench may be summarised thus: under the Hindu law there are three stages in a partition: first, a mere severance in status; secondly, severance in status accompanied by ascertainment of shares either by consent or by decree of Court; thirdly, severance in status, ascertainment of shares

and division of the family property by metes and bounds according to the shares. In their Lordships' view mere severance in status is not sufficient, and partition by metes and bounds is not necessary. What Section 25-A contemplates is a partition of the second kind, namely, severance in status accompanied by ascertainment of shares.

With regard to this classification it has to be observed that the shares of a member of a joint family is fixed by law and not by the parties as in the case of ordinary partnerships, and once severance in status is effected, the shares become automatically ascertained. It must also be remembered that these are only different stages in a partition and not different kinds of partition. There is a partition only when the last stage is reached.

The grounds on which the Full Bench have based their opinion are: *first* that Section 25-A itself 'recognises co-ownership and does not hold that a Hindu joint family must split into its individual components before it can be said that the family has partitioned its property within the meaning of the section.' But this is certainly not inconsistent with a further provision that if the co-owners want to be assessed *as separate units* there must be a partition between them of the property in definite portions. It is equally difficult to follow the second ground, namely, that the property owned by a family may be a trading business and that nothing more could be done to such business except to ascertain the shares. We doubt, further, whether their Lordships are right in taking the word 'portion' as identical in meaning with 'share'. We use the word 'portion' to denote a physical, tangible part of a thing and the word 'share' to denote an abstract fractional share, *e.g.*, we say 'a portion of the land was washed away' or a 'portion of a house is to let.' We do not use 'share' in such cases. The word 'partition' itself in its ordinary sense means division of the property between co-owners and not a mere conversion of co-parcenery into co-ownership. When we direct our attention to the wording of Section 25-A and to the exact significance of words 'partitioned' 'definite' and 'portions', we have to say with ADDISON and SALE, JJ., that it is impossible to construe the words 'property has been partitioned ......in definite portions' in Section 25-A as referring to anything other than a partition by metes and bounds, that is, a division of

the joint family property into specific portions and not merely into abstract fractional shares. To make the point clearer, if two co-sharers *A* and *B* decide to separate and merely say that each is entitled to a half share in the abstract in the common property we cannot say there has been a partition of their property in definite portions. But if they say that the eastern half of the property belongs to *A* and the western half to *B*, or that items X, Y, and Z are allotted to *A* and P, Q and R to *B*, though the making out of the items and delivery of possession may take place later on, there is a partition of the property in definite portions. And this we think is what is required for the purposes of Section 25-A.

Contingent Assessment.

The judgment of FINLAY, J., in *Lambe* v. *Inland Revenue Commissioners* [103 L. J. K. B. 69] reported at p. 494 *infra* deals with two questions which are of some general importance. In this case an assessment was made on interest which had accrued due but had not in fact been received by the assessee and the Special Commissioners, on appeal, confirmed the assessment subject to the condition that the tax should not be collected unless and until the interest was in fact received by the assessee. Referring to this mode of assessment FINLAY, J., said:

"I think this procedure is exceedingly unsatisfactory. The general position is that an assessment is made; that it is either confirmed or it is discharged or it is modified; but there emerges, if the assessment is confirmed to any extent, a sum which is due and exigible from the subject who has been assessed. I know of no provision, and my attention has not been called to any provision in the Acts which authorises the making of what one may, I suppose, not inappropriately call a contingent assessment...... If the legislature thought fit to give authority to make assessments in this contingent form, they could of course do so, but until that is done I do for myself feel that an assessment must be a definite thing..."

Assessment of Unrealised Interest.

The judgment in *Lambe's Case* (supra) contains also an instructive discussion of the general question whether, where

there is a sum due to the assessee by way of interest, that can come in as part of the income of the assessee before it has in fact been paid to the assessee. On this question FINLAY, J., said :

"Certainly one would, looking at the thing quite generally, suppose that income means what comes in and that it refers to what is actually received by the tax payer. Of course, income may be of various sorts, income under Schedule A, and under the various other Schedules ; but none the less the tax is a tax on income. It is a tax on what in one form or another goes into a man's pocket. That is the general principle."

Again, after referring to the cases cited by the Counsel, his Lordship said : "I think that if the authorities are looked at and particularly the judgment of LAWRENCE, L. J., in the *Bonner Maurice Case* [14 Tax Cas. 580] it will be seen that the judges deciding these different cases were none of them suggesting that you could have a tax where there was in fact no income received."

It was held in this case that interest on a loan, although it had accrued due could not be taxed until it had in fact been received by the assessee.

Failure to Produce Account Books of Foreign Branches.

Non-compliance with an order to produce account books relating to a business conducted in British India empowers the income tax authorities to levy best judgment assessment. The decision of the Lahore High Court in *Sonaram Nihalchand* v. *Commissioner of Income Tax, Punjab* and *N.W.F.P.*, (reported at p. 489 *infra*) shows that failure to produce account books relating to foreign branches of the assessee's business may lead to results which are not less unpleasant. In this case the assessee carried on business at Kabul (outside British India) and in Peshawar. He produced accounts relating to Peshawar but refused to produce the Kabul accounts. There were remittances from Kabul to Peshawar and *vice versa*. Though there was nothing to show that the Kabul business made any profits or that the remittances from there were out of the profits and though it appeared further from the Peshawar accounts that the total amount of the remittances from Peshawar to Kabul exceeded the remittances from Kubul to Peshawar, the revenue authorities

were held justified in levying income tax on an amount which they presumed must have been the profits of the Kabul business remitted to Peshawar. The law permits a strong presumption to be made against a person who refuses to produce his accounts and assessees who do not remember this may find themselves heavily assessed.

Construction of Income Tax Statutes: Reference to Reports of Royal Commissions.

In *Assam Railways and Trading Co., Ltd.* v. *Commissioners of Inland Revenue*, which was decided by the House of Lords in July 1934, [1934 I.T.R. 467; 103 L.J.K.B. 583], the main question before their Lordships was one relating to the construction of Section 27 of the English Finance Act, which provides for relief against double taxation in the Dominions and United Kingdom in respect of the same profits. We have adverted to this subject at p. 56 *supra*. The judgment of LORD WRIGHT in the above mentioned case deals with a question relating to construction of statutes which may often arise in the interpretation of the Income Tax Act and its amendments. The counsel for the assessee in the case sought to introduce into his argument certain recommendations from a report of a Royal Commission on income tax. He argued that, as the enactment which was being construed by the House followed these recommendations it should be presumed that the words of the enactment were intended to give effect to them and that these recommendations could therefore be used to show the intention of the legislature. His Lordship said:

"On principle no such evidence for the purpose of showing the intention, that is, the purpose or object, of an Act is admissible. The intention of the legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate". "It was clear," his Lordship said, "that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted". The observations of LORD HALSBURY, L. C., in *Eastman Photographic Co.'s Case* [1898 A. C. at p. 575] are distinguished by LORD WRIGHT on the

ground that there, that is, in *Eastman Photographic Co.'s Case*, LORD HALSBURY was treating the report as extraneous matter to show what were the surrounding circumstances with reference to which the words were used.

Reference: Starting Point of Limitation For Applying to Commissioner.

Section 66 (2) of the Indian Income Tax Act provides that 'Within sixty days of the date on which he is served with notice of an order under Section 31 or Section 32 or of an order under Section 33...the assessee in respect of whom the order or decision was passed may by application...require the Commissioner to refer to the High Court any question of law arising out of such order or decision'. In a recent case which was decided by the Lahore High Court, *Lala Har Kishen Das* v. *Commissioner of Income Tax, Punjab and N.W.F.P.* [1934 I.T.R. 484], the learned judges have held that the words "served with notice of an order" do not mean 'served with a written notice' or served with a copy of the detailed order giving reasons and that if the order was pronounced in the presence of the assessee or his agent, there would be a sufficient service of notice of the order on the assessee within the meaning of the section.

With all respect to their Lordships we think there is a clear difference in law between serving a party with a notice of an order and merely announcing an order in his presence. Section 63 of the Income Tax Act itself, to which unfortunately their Lordships' attention does not appear to have been drawn, distinctly provides that 'a notice or requisition under the Act may be served on the person therein named either by post or, as if it were a summons issued by a Court under the Code of Civil Procedure, 1908'. Unlike proceedings in Court, there is no provision in the Income Tax Act that orders under Section 31 or Section 32 shall be pronounced in open Court in the presence of the parties and the fact that the party happened to be present in a particular case when an order under Section 31 or Section 32 was present cannot empower the Income Tax Officer or Assistant Commissioner to dispense with service of notice of the order or set time running for making an application to the Commissioner for a reference to the High Court.

THE

INCOME TAX REPORTS

1934

[IN THE PRIVY COUNCIL.]

COMMISSIONER OF INCOME-TAX, UNITED PROVINCES

v.

TEHRI-GARHWAL STATE.

Lord Macmillan, Sir John Wallis and Sir George Lowndes.

December 1, 1933.

INCOME TAX—NATIVE STATE TRADING IN INDIA—PROFITS IN 1925-1926—DISCONTINUANCE OF BUSINESS IN 1927—RIGHT TO REFUND OF TAX PAID—INDIAN INCOME TAX—WHETHER TAX ON INCOME OF YEAR OF ASSESSMENT OR INCOME OF PREVIOUS YEAR—REFERENCE—JUDGMENT BASED ON WRONG CONSTRUCTION—*Res-judicata*—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 3, 66 (5)—GOVERNMENT TRADING TAXATION ACT (III OF 1926), SECTION 2.

A Native State made profits in the year 1925-1926 in British India. The Government Trading Taxation Act, 1926, which rendered States carrying on business in India liable to be taxed came into force only on April 1, 1926. The High Court held, on a reference by the Commissioner, that under Section 3 of the Income Tax Act, 1922, the State was liable to be charged in 1926-1927 to income-tax on the basis of the profits made in 1925-1926, but, as the assessment was really on the profits of 1926-1927, if the State discontinued its business or there were no profits in any year it would be entitled to a refund in so far as the actual income of the year fell short of the income on which tax had been charged for the year. There were no profits in 1926-1927 and the State claimed a refund of the tax that had

been collected from it. This question was again referred and it was contended on behalf of Commissioner that the tax paid in 1926-1927 was a tax on the profits received in 1925-1926 and that the High Court was wrong in its construction of Section 3 of the Act:

Held, *that under Section 66 (5), Income Tax Act, the judgment of the High Court in the original reference which had not been appealed from was as a whole binding between the parties whether or not it was based on a wrong construction of Section 3 of the Act, and the State was entitled to the refund claimed.*

Obiter—*The intention of Section 3 of the Income Tax Act of 1922 is not to treat the income of the previous year merely as a measure of the income of the year of assessment but to tax the assessee in the year of assessment on the income received by him in the previous year. The Indian Income Tax Act of 1922 has introduced a definite change of system in this respect.*

Cases referred to:

BEHARI LAL MULLICK, *In re* [1927] (I. L. R. 54 Cal. 630; 103 I. C. 609; 31 C.W.N. 557; A. I. R. (1927) Cal. 553).

RAMPRASAD, *In re* [1930] (I. L. R. 52 All. 419; A. I. R. (1930) All. 389; 1930 A.L.J. 579; 127 I.C. 579).

Appeal from a Judgment of the Allahabad High Court.

Dunne, K. C., and *R. P. Hills*, for the Commissioner.

A. M. Latter, K. C., and *W. Wallach*, for the assessee.

The Judgment of the Judicial Committee was delivered by SIR GEORGE LOWNDES. Between April, 1925, and March 31, 1926, the Tehri-Garhwal State, the respondent in this appeal, carried on a timber business in British India, which resulted in considerable profits. The State was not during that year subject to the Indian Income Tax law, but in 1926 the Government Trading Taxation Act was passed by the Indian Legislature and came into force on April 1, that year. Section 2 of the Act is in the following terms:—

2.—(1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's

Dominions, exclusive of British India that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India, and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable—

(*a*) to taxation under the Indian Income Tax Act, 1922, in the same manner, and to the same extent as in the like case a company would be liable ;

(*b*) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable.

(2) For the purposes of the levy and collection of income tax under the Indian Income Tax Act, 1922, in accordance with the provisions of sub-section (1), any Government to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly.

(3) In this section the expression "His Majesty's Dominions" includes any territory which is under His Majesty's protection in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions."

Assuming for the purposes of the present appeal that under this section the State became (as has been held in India) liable to taxation for the revenue year 1926-27 upon the profits of its timber business, income tax would be chargeable under Section 3 of the Act of 1922 *in respect* of its trading profits for the previous year, *i.e.*, the year ending March 31, 1926, and super-tax would follow under Section 55, at the rates imposed by the Finance Act for the year.

The State was accordingly in the year 1926 called upon to pay by way of income tax and super-tax sums totalling Rs. 43,294-14-0 calculated upon the profits earned in 1925-26. The figures are not now in dispute, but from the first the State has contested its liability to taxation. It appealed from the original assessing authority to the Commissioner, and from the Commissioner, upon a reference made by him under Section 66 (2) of the Act, to the High Court.

This reference was heard by MUKERJI AND NIAMATULLAH, JJ., on November 21, 1929 [*vide Ram Prasad, In re* (1930) A.L.J 579—Ed.]. Four questions of law had been formulated by the Commissioner. Question (1) was upon the State's contention that the Act of 1926 was not applicable to it. Questions (3) and (4) were concerned with the nature of its dealings in British India. Question (2) upon the answer to which their Lordships think that the result of the present appeal depends, was as follows :—

(2) Whether, since the Government Trading Taxation Act only came into force on April 1, 1926, there is any liability for assessment with reference to transactions which took place before that date ?

Upon this question the judgment of the High Court must be quoted in full:—

" Now we come to Question No. 2. The argument is that the income that is being taken into consideration for taxation accrued to the State in 1925-26, that the Government Trading Taxation Act came into force on April 1, 1926, and that, therefore, it would have no application to the income which was earned in the previous year (1925-26). On the face of it, this argument is very attractive ; but in view of the language employed in Section 3 of the Indian Income Tax Act we do not think that it has much force. The Tehri State, we have been told, has continued this business in years subsequent to 1925-26, and the Income Tax Department has sought to assess it for the year 1926-27. The tax is to be paid in and for that year. The Income Tax Department is armed with power to tax the Tehri State any time after April 1, 1926. That being so, let us read Section 3 of Act XI of 1922. We have already read it once before. Now, substituting the years with which we have to deal, the section would read as follows :—

" Where any Act of the Indian Legislature enacts that income tax shall be charged for the year 1926-27....tax,....shall be charged for the year 1926-27....in respect of all the income, profits and gains of the previous year (1925-26)...."

" This is the natural reading of Section 3 in view of the facts before us. It seems to be quite clear to us that the tax which

has to be paid by the Tehri State for the year 1926-27 is to be paid on the amount of profits earned by it in the year 1925-26. If the State decided to stop its business, say in the year 1930-31, the tax paid by it in 1930-31, on the basis of the income of 1929-30, would be liable to be refunded, in so far as the income of the year 1930-31 fell short of the income earned in 1929-30."

In the result the learned Judges were of opinion that none of the grounds taken by the State were tenable.

By the time this judgment was delivered it had apparently been ascertained that the State had in fact no taxable income in the year 1926-27, though whether the business had been discontinued, as the High Court seems to think, or whether it was only that no profits resulted, seems to be uncertain.

A part payment of Rs. 25,000 had been made by the State before the reference, which left a balance of Rs. 18,294-14-0 due upon the demand of the Income tax authorities. The State, basing itself upon the judgment of the High Court, claimed the return of the Rs. 25,000 on the ground that it had no taxable income in the year 1926-27. The Commissioner with equal confidence claimed payment of the Rs. 18,294-14-0. A second reference was thereupon made to the High Court, this time by the Commissioner of his own motion, asking for the determination of the following questions :—

"(1) Does the judgment delivered by the High Court in Miscellaneous Case No. 671 of 1929 on November 21, 1929, operate of its own force to require the Income Tax Department to refund the sum of Rs. 25,000 paid by the Tehri Darbar, and to refrain from collecting the balance of Rs. 18,294-14-0?

"(2) if the answer to question (1) is in the negative :—

"(*a*) Is the Tehri Darbar liable to pay the balance of Rs. 18,294-14-0?

"(*b*) Is the Tehri Darbar entitled to a refund of the amount already paid, *i.e.*, Rs. 25,000?"

The reference was heard by the same two Judges as in the previous case, and their judgment was delivered on November 6, 1931. They answered the first question in the affirmative, and

held that the State was not liable to pay the balance of Rs. 18,294-14-0, and that it was entitled to a refund of the Rs. 25,000.

The learned Judges recited the passage from their previous judgment, which has been quoted above, and proceeded to interpret the language they had used, and the principle upon which their decision was based :—

"We have carefully read our order of November 21, 1929, and entertain no doubt as to what we intended to hold and did hold. On a consideration of Section 2 of the Government Taxation Act (III of 1926), we were quite clear that the liability of the Tehri State to pay the income-tax arose for the first time after April, 1926, if it had assessable income in British India after that date. We proceeded to hold that the Tehri State was liable to pay income-tax on the income of 1926-27 which for the purposes of assessment, was to be measured by the income received in the preceding year (1925-26). We did not intend to hold and did not hold, nor is there anything to that effect in our order dated November 21, 1929, that the Tehri State was liable to pay income-tax on the income received before April 1, 1926, when the liability arose, that is, in the year 1925-26, the income of which year was imported into the consideration of the case merely as the basis of provisionally ascertaining the income of 1926-27, on which the tax was demanded. It was for this reason that a reference to possible refund in some future year was made by us. It is obvious that, if the income of the current year has to be taxed, the exact amount of income cannot be ascertained before the expiry of the year and that, if the tax is assessed and collected on the basis of the income of the preceding year, the question of refund must arise in case the business is discontinued in that year or if the total income falls short of the income of the preceding year which was assumed for the purposes of assessment as the income of the current year. This process of reasoning and the assumption that the assessment had been made in respect of the income of 1926-27 were partly, at any rate, inspired by the view expressed in the order of the Income-tax Commissioner, dated March 14, 1928, and by the strenuous opposition offered on

behalf of the Crown to the contention of the Tehri State that the tax was claimed in respect of the income of the year 1925-26. Holding, as we did, that the Tehri State had been assessed to tax in respect of the income of 1926-27, calculated provisionally on the basis of the income which had accrued in 1925-26, we repelled the objection of the Tehri State. The provision of refund in our order in case of discontinuance of business in any future year in respect of which the tax might be assessed and collected is an integral part of our order and a necessary corollary to the rule on which we upheld the assessment then under reference. It was not an *obiter dictum*."

No inconsistency has been pointed out between the passage here cited and that quoted from the first judgment, and their Lordships think that this must be taken to be the meaning and effect of that judgment.

The Commissioner being dissatisfied with the decision of the High Court has appealed to His Majesty in Council, asking for its reversal.

The principal contention on his behalf is that the learned Judges have misconstrued Section 3 of the Act of 1922; that the intention of the section is not to treat the income of the previous year merely as a measure of the unascertained income of the year of assessment, but to tax the assessee in the year of assessment upon the income received by him in the previous year, and that this is clearly competent in the case of the Tehri-Garhwal State under the Act of 1926. It is contended that though the theory adopted by the learned Judges may have been right under the provisions of the previous Income Tax Act of 1918, a definite change of system was made by the Act of 1922, and reliance is placed in this connection upon a decision of the Calcutta High Court, In re *Beharilal Mullick.*

Their Lordships think that there is much force in these contentions, and if the question they had to decide on the present appeal were merely as to the true meaning of Section 3 of the Act of 1922, they might be prepared to endorse the view taken by the Calcutta High Court. But that is not the position in the case now before them. The former judgment of November 21,

1929, was not appealed against, and whether right or wrong, must govern the relations of the parties in the particular case. It is to be noticed that under Section 66 (5) of the Act of 1922, the judgment of the High Court is to contain the grounds upon which the decision is founded: that a copy of the judgment is to be sent to the Commissioner, and that the case is to be disposed of by the Income tax authorities "conformably to such judgment." Under this provision their Lordships think that the judgment as a whole is binding between the parties in the particular case. If the judgment expounded a wrong construction of the Act, as the appellant now contends, an appeal against it was open, and there is no other procedure by which it could be corrected.

On the assumption, which their Lordships are satisfied must be made for the purposes of the present appeal, that Section 3 of the Act was to be construed in the way the learned Judges construed it, they think that the consequences would follow which have been ascribed to this construction in the judgment now under appeal; that the respondent State would be relieved from the demand for payment of the Rs. 18,294-14-0 and would be entitled to repayment of the Rs. 25,000. In their opinion therefore, the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors—Solicitor, India Office, for the appellant; *Hy. S. L. Polak & Co.,* for the assessee.

[IN THE COURT OF APPEAL.]

ASSAM RAILWAYS AND TRADING CO.

v.

INLAND REVENUE COMMISSIONERS.

Lord Hanworth, M. R., Lawrence, L.J., Slesser, L.J.

July 10, 11, 1933.

REVENUE—INCOME TAX—COMPANY EARNING PROFITS IN INDIA—PAYMENT OF INDIAN INCOME TAX—RELIEF FROM TAX IN UNITED KINGDOM—DOMINION INCOME TAX—FINANCE ACT, 1920 (10 & 11 GEO. 5, c. 18), Sec. 27.

A company earned profits in India amounting to £ 186,808, upon which sum they were liable to English income-tax. By the Indian revenue laws they were allowed to deduct interest on debentures and other items, which reduced their profits assessable to Indian income-tax to £ 129,365, upon which sum tax was paid in India. They claimed relief from income-tax in the United Kingdom under Section 27 of the Finance Act, 1920, in respect of the Dominion tax paid, and contended that their total income assessable to tax in England could be treated as having borne other tax in India: Held, *that their income must be computed at the full sum of £ 186,808, upon which sum they were liable to taxation in the United Kingdom, and relief could only be granted in respect of the £ 129,365, upon which Dominion tax had been paid, that being the only sum which could be said to have suffered dual taxation.*

ROLLS ROYCE, LTD. *v.* SHORT [1925] (94 L.J.K.B. 651; affirmed in C.A. 94 L.J.K.B. 849; 10 Tax Cas. 59), *distinguished.*

Cases referred to:

FRY *v.* SALISBURY HOUSE ESTATE, LTD. [1930] (99 L.J.K.B. 403; [1930] A.C. 432; 15 Tax Cas. 266).

INLAND REVENUE COMMISSIONERS *v.* DALGETY & Co. [1930] (99 L.J.K.B. 342; [1930] A.C. 527; 15 Tax Cas. 216).

ROLLS ROYCE, LTD. *v.* SHORT [1925] (94 L.J.K.B. 651; affirmed in C.A. 94 L.J.K.B. 849; 10 Tax Cas. 59).

Rover v. South African Breweries [1918] (87 L.J. Ch. 516; [1918] 2 Ch. 233).

Appeal from a decision of Finlay, J., on a Case stated, affirming the decision of the Special Commissioners.

The following facts are taken from the judgment of Lord Hanworth, M.R.:

"This is an appeal from a decision of Finlay, J., which was given on February 14, 1933. The case raises an important point —I may say a very important point—to the appellants, the Assam Railways and Trading Co. They are seeking to have relief under Section 27 of the Finance Act, 1920, in respect of certain income-tax charged in the United Kingdom by reason of the fact that they have paid what is called 'Dominion Income-tax.'

"The facts upon which the point arises may be stated quite shortly. The business of the company is a composite one. It runs a railway, and, as the part of its name 'Trading Company' indicates, it has other activities; for instance, it works coal mines, timber concessions, saw-mills and brick-works, and carries on a plantation business in Assam. The company is an English company; it is controlled by a board in England. It is taxed under Case I of Schedule D on the whole of the profits which arise from its business in India, and it is from India, and from India alone, that its profits are derived.

"Now the company has issued certain debentures, and the interest which is required for the service of payment upon the debentures is a sum of £ 42,500. That figure has been referred to with some insistence because it is a figure which is the largest sum which creates the divergence in the two views expressed between the appellants and the respondents in this Court. The company claim that they are entitled to have a deduction made in respect of the income-tax which they have been charged in India. They say that the whole of their profits arising from the whole of their business have come under the review of the Income-tax authorities in India, and the result is that they have, according to the system prevailing in India, paid income-tax upon the whole of their profits before those profits

came over here and were received by the board in London, and they claim that they are entitled, in consequence, to have the relief which they are given by Section 27 measured by the fact that the whole of their profits have already suffered a diminution by paying income-tax to the Indian central authority.

" One of the most notable differences between the system of calculating the assessable income in India and in England is this: Whereas under rule 3 of the Rules to Cases I and II of Schedule D it is provided that in the United Kingdom in computing the amounts of the profits or gains which are to be charged no sum shall be deducted in respect of any annual interest payable out of the profits and gains, and there is therefore, no right to deduct the sum which has to be paid by way of interest upon the debenture debt; it is otherwise in India, and apparently they are allowed to deduct, before computing their true profits, a sum which has to be charged against those profits for the purpose of paying the debenture interest. It will be noted, therefore, that in figures which are considerable, but are not so large that a sum of £42,500 is a negligible item, there must arise a considerable difference between the profits which are subjected to Indian income-tax and the profits which, according to English computation, would be subjected to the English income-tax. In the first case, the company would be entitled to deduct £42,500 from their profit in India, and therefore pay a smaller sum as the total due from them for income-tax, whereas, if the same profits were to be scrutinised according to the English system, they would not be allowed to deduct this £42,500. I have given that figure in order to make a distinction which stands out in the two systems adopted by the Dominion and by the United Kingdom; but I think that dwelling upon a particular item, large and important though it is, is likely to lead one into an error when we have to consider the problem that is before us.

" The question is what relief from the United Kingdom income-tax is the Assam Railways and Trading Co., entitled to? They contend—I am reading paragraph 10 of the Case—'that the relief should be based on the amount of the income as computed for the purpose of the United Kingdom income-tax, and that the method by which the Indian assessment was computed

and the deductions allowed in arriving at that assessment were immaterial. That, accordingly, the fact that the debenture stock interest had been allowed as a deduction, and that the Bogapani Tea Garden item had not been included in computing the Indian assessment should not be taken into account, and the relief should be allowed on the amount of the United Kingdom assessment, without any deduction for these two items.' Shortly put, I may repeat that the claim of the company is to say: 'The whole of our profits have been reviewed for the purpose of paying income-tax in India; it is the whole of those same profits which are under review in the United Kingdom for the United Kingdom tax; and we are entitled to relief in respect of the whole of those profits, for they are the same in both countries.'"

FINLAY, J., held, while the appellants were liable to tax in the United Kingdom on the full income of £186,808, they could only claim relief from Indian income-tax to the extent to which that tax had been paid, namely, on the sum of £129,365.

The appellants appealed.

Latter, *K. C.*, and *Cyril King*, for the appellants.—The income of the company is the income for all purposes, and the Dominion income must be deemed to have paid its quota of Dominion tax—*Rover* v. *South African Breweries*. The facts in *Rolls Royce Ltd.* v. *Short* were different, but the principle was established that the foreign income is the income for all purposes. The full income of £186,808 has been assessed in India and agreed as the income of the appellants; it has been put under the income-tax harrow there, and has borne its proper share of Indian tax. Any special concessions which the tax authorities in India may make do not alter the fact that the whole of that income has been submitted to the appropriate tax, and is therefore entitled to relief in the United Kingdom.

The Attorney-General (*Sir Thomas Inskip*, *K. C.*), and *Reginald Hills*, for the respondents.

The relevant parts of Section 27 of the Finance Act, 1920, are set out in the judgment.

LORD HANWORTH, M. R., stated the facts and continued: Now we have to look at Section 27 of the Finance Act, 1920,

very carefully. Two cases have been called to our attention, the one the *Rolls Royce* Case, the other the *Dalgety* Case. I think it may be at once stated that the latter case has no relevance to the point we have to consider. In the *Rolls Royce* Case it is said by counsel for appellants, in a forcible argument, that there are words to be found in WARRINGTON, L.J.'s judgment, and also in ATKIN, L.J.'s which, if they do not confirm, at any rate led on to, the view which he has advanced in this Court. For my part, while I adhere to the judgment I expressed in that case, and in particular to the conditions on which relief is given, and which I table, I also think it wise to repeat what I said there, that "It is never possible to forecast the result of such a relieving section generally. Experience may prove that in effect it does not give relief in as many cases as it was hoped and anticipated, and indeed intended that it should do." This case, to my mind, must be considered in the light of its own facts and in the interpretation to be put upon the section itself. Now Section 27 was intended to give a relief from the United Kingdom tax in respect and because of the payment already made of a similar tax in a Dominion, and, as I point out in the *Rolls Royce* Case, a person who is entitled to relief is a person who has paid United Kingdom tax by deduction or otherwise for any year of assessment on any part of his income. The relief is a relief from United Kingdom tax, and it is upon that part of his income which has paid Dominion income-tax.

Now what does one mean by "United Kingdom income-tax" and "Dominion income-tax"? Before I examine sub-section 1, I wish to go to the table of interpretations which are to be found in sub-section 7 and which are contained in (*b*), (*c*) and (*d*). We are there told that for the purpose of the construction of this sub-section 1 we are to interpret the term "United Kingdom income-tax" in a particular way, and it means the income-tax chargeable in accordance with the provisions of the Income Tax Acts. Next, (*c*), "The expression 'Dominion income-tax' means any income-tax or super-tax charged under any law in force in any Dominion, if that tax appears to the Special Commissioners to correspond with United Kingdom income-tax or super-tax." The duty of deciding whether such a tax corresponds with income-tax or super-tax of the United

Kingdom charged upon the Special Commissioners is no doubt for this purpose, that in some Dominions there may be an analogous tax, imposed under a different name or with a somewhat different system, but yet a tax which the subject may be able to convince the Special Commissioners has the same characteristics that belong to our own income-tax over here. "(*d*) The expression 'Dominion rate of tax' means the rate determined by dividing the amount of the Dominion income-tax paid for the year by the amount of the income in respect of which the Dominion income-tax is charged for that year." Then there is an exception, that where it is charged on an amount other than the actual profits, the Dominion rate of tax shall be determined by the Special Commissioners, also giving power to the Commissioners to adjust what needs adjustment if it is not charged in respect of actual profits. Then come some further words, that "For the purposes of this section, the rate of United Kingdom income-tax shall be ascertained by dividing by the amount of the taxable income of the person concerned the amount of tax payable by that person on that income before deduction of any relief granted" and so on. Now to my mind the directions and interpretation given in (*b*), (*c*) and (*d*) all point to the separate systems of ascertainment of income-tax being treated as separate and independent—different firmaments, if I may use that expression—and you are to ascertain the Dominion rate of tax by taking the sum which is actually charged for the year and making your calculation by a dividend and a divisor; and in the same way you are to ascertain the rate of the United Kingdom income-tax, again, by taking the actual amount of the taxable income. We have therefore got in those passages a definite reference to what is the statutory or taxable income, quite apart from, and independent of, the real income.

Now, be it remembered that the amount of relief which is to be given under sub-section 1. is not from the whole of the tax paid in a Dominion; it is to be determined as follows: "If the Dominion rate of tax does not exceed one-half of the appropriate rate of United Kingdom tax, the rate at which relief is to be given shall be the Dominion rate of tax: In any other case the rate at which relief is to be given shall be one-half of the appropriate rate of United Kingdom tax." To my mind, it is quite

plain that you have got to take the two separate systems of ascertaining taxable incomes in each country, and, when you have got those two rates, then you are able to set one rate against the other, and you may get the whole of the Dominion rate allowed if that is less than one-half of the appropriate rate in the United Kingdom, but you cannot get more than one-half. Those factors are, to my mind, very important in considering what is to be the right interpretation of sub-section 1. We have to consider that a subject who is a taxpayer in the United Kingdom may under certain circumstances be entitled to recover or have relief from not more than one-half of the United Kingdom tax in respect of his payment of Dominion tax, that rate being discovered by the amount paid for the year of Dominion income-tax.

Now in the present case we have not got the complexity which arose in the *Rolls Royce* Case of a different system of computing the tax, nor have we got the difficulty that may arise from the different terminations of the year of charge. We have the simple case of two similar periods, and the same profits, but charged under the statutory directions in each country in a different way and resulting, therefore, in a different tax. It is said by counsel for the appellants: "If you will apply the system of what may be called the *Salisbury House* Case to the profits which have been dealt with in India, the whole of the income has been scrutinised for the purpose of being charged to Dominion income-tax; all of it has been passed in review; and it matters not whether some items have been allowed by way of deduction or not. The whole of it has been reviewed, and therefore it is comparable with the whole of the income which has once more to be reviewed for United Kingdom income-tax." I repeat that by way of emphasis because I now proceed to look at sub-section 1. It says: "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income-tax for any year of assessment on any part of his income"—now that includes, and it must be remembered that these words include, and identify, a person of this sort: a person who may have a composite income derived in part from securities which would fall to be taxed under Schedule C, some part of whose income would fall to be taxed under Schedule A, and some portion of whose income is derived

by profits sent over from a Dominion. The part of the income that is cognisable under this section is the part which comes from the source overseas and which is to that extent separate and distinguished from the part which he may enjoy and falls under Schedule C. Now having got that, if that person, proves to the satisfaction of the Special Commissioners that he has paid Dominion income-tax for that year in respect of the same part of his income "—again that would be the part as contra-distinguished from the part of his income that falls under Schedule C—" he shall be entitled to relief from United Kingdom income-tax paid or payable by him on that part of his income "—that is, the part that comes from overseas—" at a rate thereon to be determined as follows."

The situation which is claimed by counsel on behalf of the company is very arguable; it is attractive, and indeed I make no secret that during the considerable part of this case I was inclined to hold the view which counsel presented. I am glad to reveal that, because it shows—at least I hope it shows— that I have given full consideration to the view presented. But when we come to consider what is to be the relief, it has to be shown by the taxpayer that on a part of the income which is his statutory income in the United Kingdom he has paid Dominion income-tax for that year. Now, are we to re-open and to readjust the figures in each country? Are we to set side by side the items which compose the total assessable income for which the man is to be charged first in the Dominion and afterwards in the United Kingdom? To my mind, not so. You have to deal with the results which have been attained by following the legislative directions in each country, and you have to deal with the total result when those exceptions or deductions or abatements have been allowed, and you cannot scrutinise those abatements or deductions by a comparison with a different system in the other part of the Commonwealth; and it falls upon the taxpayer to prove that he has paid income-tax for that year in respect of the same part of his income. Now he has paid in the present case tax on a part of his income which is revealed by the assessment made upon him which I find at p. 5 in the exhibit "C": there is found the order as to what this company is to pay: "Order. The Income Tax adjustment account of the Company

is as follows": profit is taken, and the allowance for debenture interest, and so on. The result is that the total figure is £129,365; then by converting that into rupees at 1s. 6d. you get a figure of 1,724,866 rupees, and an income-tax at 18 pies upon that brings you to a total assessment of 161,706 rupees 3 annas. That is your total sum that has to be paid, and that is the total of the statutory income which is made chargeable to income-tax, and that is the amount that is paid. If you take that in your hand, the company can then show that it has paid income-tax at the rate which will be discovered by following out the directions which I have already referred to in (c); you will then find that it has paid tax on this sum of £129,365 at that rate, and, as we know those are the profits of the company, the company can show that to that extent, the extent of £129,365, they have paid Dominion tax for that year in respect of that part of its income, and that is the same part as falls to be included in the total statutory income subjected to United Kingdom income-tax. It is in respect of that sum, and, so far as I can understand, that sum only, that the relief is given by the section. As a matter of fact, we read from the Case that for some reason, which I dare say is good but does not for the moment appear very easy to understand, the Commissioners have allowed that Dominion income-tax has been paid on a sum of £135,907, part of the total sum which is assessed to United Kingdom income-tax, namely £186,808. If any adjustment has to be made the Case will have to go back to the Commissioners for it to be made, but as I suppose the Crown are content with the figures as represented in the Case the figure of relief would then stand as on £135,907, which appears to be larger than the figure on which there was an actual payment of the tax upon the statutory figure found to be liable to Dominion income-tax.

It is for these reasons that I have come to the conclusion that the respondents are right, and that the appeal must be dismissed with costs. I will only add this, that, while I adhere to the conditions that I table in the [1]*Rolls Royce* Case, I do not find assistance from that case, because I think that all the Judges were making the observations that they did in that case *alio intuitu*, and we have a different problem to solve, based upon the proper construction of Section 27.

LAWRENCE, L.J.—I agree. Section 27 is aimed at relieving a taxpayer against double taxation where he has already paid Dominion income-tax in respect of the income which is sought to be taxed in the United Kingdom.

In the present case there is no complication of facts or figures. The income-tax is assessed on the gains and profits earned in the same period in India and in England; the amount of the profits and gains to be brought into charge for income-tax is the same in both countries. In India allowances are made in respect of the profits and gains which result in the taxable income of the appellants being £ 129,365. In the United Kingdom allowances are made in respect of the same profits and gains which result in the taxable income of the appellants being £ 186,808. Now what has to be ascertained in order to measure the relief to which the taxpayer is entitled under Section 27 is: On what part of the taxable income in the United Kingdom have the appellants paid income-tax in India? To my mind the answer in the circumstances of this case is plain: that they have only paid Indian income-tax upon £ 129,365, part of the taxable income in the United Kingdom of £ 186,808, and that there is no duplication of taxation so far as regards the difference between those two sums, with the result that the appellants are only entitled to relief in respect of £ 129,365, part of their taxable income of £ 186,808. That, it seems to me, is carrying out both the letter and the spirit of Section 27.

I agree that this appeal fails.

SLESSER, L.J.—I agree. I find, in the case of *Rolls Royce, Ltd.* v. *Short*, although the matter there to be considered was different from that in the present case, a statement of principle in the judgment of the Master of the Rolls which I apply in the present case. My Lord says this (94 L.J.K.B., at p. 853; 10 Tax Cas., at p. 70): "The fact of paying a tax in a Dominion does not induce relief. The basic condition is that a person has paid tax on his income over here; then if some part of that income so charged and assessed to tax in the United Kingdom can be identified and proved to have paid Dominion tax, that same part which has suffered dual taxation can be relieved of the tax paid here up to the measure of relief given by

the section." Now applying that basic condition to the present case, I ask myself what amount here can be identified and proved to have paid Dominion tax so that, related to the income-tax charged in the United Kingdom, it can be said that that amount has suffered dual taxation; and the amount, as appears from paragraph 8 of the Case, is £ 129,365. That sum and that sum only, in my opinion, can be identified and proved to have paid Dominion tax out of the total of £ 186,808 assessed to United Kingdom income-tax. I do feel the difficulty which has been pressed upon us by counsel for the appellants to be such that we are compelled to say, as his argument would lead us to say, that, directly it is shown that a part of the income which is assessable to United Kingdom income-tax has paid tax in India, necessarily the whole part which is assessable to income-tax in India is thereby relieved, regardless of the amount of income there liable to taxation. I do not think that the language requires that, and I think the language which speaks of the necessity that he has paid income-tax in respect of the same part of his income requires the Commissioners first to inquire what is the part of the income and then to consider, as my Lord has said in the *Rolls Royce* Case, whether he has in fact paid Dominion income-tax on it or not. The result of any other view, unless one were driven by the language to take it, would be, as it seems to me, that, however small the sum which had been paid in India in Dominion income-tax there which was paid in respect of part of his income, the whole of the income which under review in that country, though possibly completely exempted, would have to be deducted from the United Kingdom income-tax here, so that the result is that, so far from suffering dual taxation, the subject might escape a very considerable amount of taxation in both countries. Fortunately, I do not think, either on the authority of the *Rolls Royce* Case, or on the language of this section, we are driven to that conclusion.

Appeal dismissed.

Solicitors—Taylor & Humbert for appellants; *Solicitor of Inland Revenue*, for respondents.

[IN THE PATNA HIGH COURT.]

BANSIDAR PODDA *v.* COMMISSIONER OF INCOME TAX, BIHAR & ORISSA.

Courtney-Terrell, C.J, and Kulwant Sahay, J.

October 11, 1933.

INCOME TAX—BAD DEBTS—WHEN TIME-BARRED DEBT BECOMES BAD—PRESUMPTION.

The mere fact that a debt was incurred beyond the period of limitation will not of itself make the debt a bad debt; nor is a debt which is not statute barred necessarily good.

The practice of regarding a debt as prima facie *bad when it is barred by limitation and no longer recoverable is not, however, unreasonable, but this presumption is rebuttable according to the circumstances of the case.*

A debt was kept alive from the year 1979-80 until 1982-83 by successive acknowledgements. The assessee claimed deduction of this debt as bad debt in 1985-86. There was no finding of fact to show when it became bad and irrecoverable except the finding that it became-time barred in 1985-86: Held, *that the assessee was entitled to deduct the amount as a bad debt from the income of the year 1985-86.*

COMMISSIONER OF INCOME TAX, C. P. AND BERAR *v.* SIR S. M. CHITNAVIS (1932) 59 I. A. 290; 137 I. C. 772; 28 N. L. R. 205; 1932 Comp. Cas. 464, referred to.

Case stated by the Commissioner of Income Tax, Bihar & Orissa, under Section 66 (3) of the Income Tax Act, 1922 (Mis. Judicial Case No. 59 of 1932).

K. P. Jayaswal, G. P. Das and *C. S. Jayaswal*, for the assessee.

Manohar Lal, for the Crown.

COURTNEY-TERRELL, C. J.—This is the statement of a case under Section 66, sub-section (3), Income Tax Act, by the Commissioner regarding the assessment upon the assessee. The facts which have given rise to the assessment and the history of the procedure may be stated thus. The assessee who appears to

carry on a considerable business, keeps his account in the mercantile system and therefore his income in the year and the allowable deductions from that income are of a notional character and depend upon the state of affairs as properly shown by his books. The period under assessment is the *Sambat* year 1985-86 and the petitioner claimed as a deduction from his income the sum of Rs. 30,580 as a debt which he said had become bad in that year. A considerable time ago the assessee had advanced a sum of money to one Janki Das and by the *Sambat* year 1985-86 this had accumulated to the said sum of Rs. 30,580. From the year 1979-80 until the year 1982-83 there were acknowledgements by the debtor Janki Das in the books of the assessee and in each of those four successive years the total amount of the debt up to that date was stated together with interest for that year. The interest was compound interest and therefore there was a continuance of the transactions during those years, the amount of interest continually increasing and inasmuch as the interest was of a compound character, the amount of the principal debt continued to increase. After the year 1982-83 no further interest was charged but a special demand charge was entered up in the books. Now inasmuch as the last acknowledgement by the debtor was in 1982-83, the period of limitation for the recovery of the debt expired in 1985-86. The Income-tax Officer, before whom the matter first came, in his report to the Assistant Commissioner, stated this fact and made the following statement:

"The Civil law on the matter is that the assessee could not extend the limitation by book debit of interest, nor even by a stamped endorsement if the loan itself had become barred for realization. In fact the loan has become barred long ago and the assessee cannot put in a claim for deduction of this too old a bad debt (*sic*) in the accounts of 1985-86. The item is therefore disallowed."

The matter then came before the Assistant Commissioner and he took the same point of view as that adopted by the Income-tax Officer. There was then a petition under Sections 33 and 66, sub-section (2), to the Commissioner and the Commissioner refused to state a case before the High Court, but dealt with the matter upon the same basis as that adopted by the Income-tax Officer and by the Assistant Commissioner. He

said moreover in paragraph 8 of his order in the revision case that the proper way to deal with the question of whether the debt had become bad was to see whether it was incapable of realization, and when it became incapable of realization, and that he came to the conclusion, in agreement with the Income-tax Officer and the Assistant Commissioner that the debt had become barred by limitation in the year 1982-83 and not 1985-86. The assessee then came to this Court with a petition praying for an order on the Commissioner to state a case. In the order of this Court the Commissioner was asked to state a case upon three points mentioned by the petitioner in his petition. The points were:

"(1) When does a debt become a bad debt? Has the assessee the option of declaring debts bad when he finds that from the circumstances of the debtors he is unable to recover them? Can the Income-tax authorities deprive him of this option? (2) Whether the debt due from Messrs. Janki Das Ganpat Rai became barred in the year 1981-82 or 1985-86 *Sambat* having regard to the fact that the said debtors acknowledged their liability to pay and admitted the correctness of the balance brought forward in petitioner's account books in the year 1982-83 *Sambat*? (3) If the debt became legally barred in 1985-86 is the assessee entitled to claim deduction of the said amount of Rs. 30,580 from the income for the year 1985-86 *Sambat*?"

After the receipt of that order the Commissioner proceeded to the statement of the case and he stated that he was of opinion that the date by which the debt became irrecoverable by means of limitation was three years from the date of the last acknowledgement, that is to say, in the year 1985-86; but he correctly appreciated the law which had since the date of the order of this Court, become manifest in the decision of the Privy Council in the case of *Commissioner of Income-tax, Central Provinces* v. *Chitnavis*. He saw that the question for determination as a matter of fact would have been on what date the debt became bad and not the date on which it became barred by limitation. As pointed out by their Lordships a debt on the one hand may be barred by limitation, but owing to the honesty of the debtor and possibly his means, hope need not have been aban-

doned of recovering the debt. On the other hand notwithstanding the debt may not have been barred by limitation, the circumstances of the debtor may have made the debt quite irrecoverable. He therefore proceeded upon what he has described as a further inquiry by himself and the results of that inquiry are set forth in the last paragraph of his statement of the case.

Now it is clear that it has been the practice of the Income-tax Officer, and one cannot say that it is an unreasonable practice, to regard a debt as bad *prima facie* when it is barred by limitation and no longer recoverable and that appears as being the guide in the matter. The presumption is, however, rebuttable by evidence according to the circumstances of the case. The Commissioner when stating the case departed from the presumption laid down by his own predecessor and as I have said he purported to make an inquiry to see if the debt, whether barred or not barred by limitation could be considered as bad in the year 1985-86. As I have said the presumption was that inasmuch as it would become barred by limitation in 1985-86 as stated by the Commissioner himself, the question was whether that presumption could be displaced. The finding of the Commissioner is of a peculiar character. As stated by himself he seems to have startted with the conclusion that the debt was still recoverable because he refers to the considerable means of the debtor but in the end he does not seem to be determined in his mind whether the debt was still recoverable or whether it had become bad and irrecoverable at a period anterior to the period under discussion. He therefore is reduced to stating that the assessee had not succeeded in showing him that the debt became bad in the particular period which was being considered, forgetting that having regard to the general practice, the irrecoverability of the debt in the absence of other evidence would be assumed to be when it became barred by limitation. The supposed finding of fact is therefore no proper finding at all. Moreover, the assessee has been able to point out, and indeed it is admitted by the Department, that for the years during which the acknowledgment by the debtor was given and interest accordingly charged in the books of the assessee, the Department actually taxed the assessee in respect of such interest and they therefore

themselves treated the debt as being still alive and the income as having been notionally received.

The present decision with which we are dealing that the debt became irrecoverable and had ceased to exist as notional liability before the period 1985-86 cannot be justified on any ground of consistency. The procedure adopted by the Commissioner in starting an inqniry after the order of the High Court directing him to state a case is to my mind to be deprecated in this particular case, because it is clearly a hurried inquiry undertaken in order to bring the case within the law as stated by the Privy Council. The assessee was all along under the impression, as was indeed the Court, that the matter to be dealt with was the state of facts which led up to the appellate order and the materials upon which the appellate order founded the decision. At the last minute to conduct a sudden inquiry, even if that were a legal inquiry, is hardly a procedure in accordance with the principle of fairness to the assessee; nor has the inquiry, such as it is, resulted in any further finding of fact which is of assistance in determining the points before us. The first of the questions which are set forth in the statement of the case is answered correctly by the Commissioner himself. The question as to whether the debt became barred in 1981-82 or 1985-86 has already been answered correctly by the Commissioner himself. It is clear that it did not become barred until three years after the last acknowledgement in 1982-83; and as to the third question, having regard to the facts with which we have to deal as stated by the Commissioner, that is to say, that the debt had become barred in 1985-86 and there being no other finding of fact before us to show when the debt became bad and irrecoverable other than the finding that the debt became bad by reason of the fact that it was barred, it is clear that the assessee is entitled to deduct the amount of Rs. 30,580 from the income of the year 1985-86 *Sambat*. This expression of opinion covers all the questions which we have been asked to decide. The assessee has succeeded and he will be entitled to receive back Rs. 100 which he deposited with the petition and receive five gold mohurs as hearing-fee in addition to the printing cost.

KULWANT SAHAY, J.—I agree.

Reference answered.

[IN THE RANGOON HIGH COURT.]

COMMISSIONER OF INCOME-TAX, BURMA

v.

J. I. MILNE.

Page, C. J., Das, J., and Mya Bu, J.

July 3, 1933.

INCOME TAX—LOAN ON CONDITION OF PAYMENT OF PART OF PRICE OF DEBTOR'S PROPERTY IF SOLD—SALE PROCEEDS RECEIVED BY LENDER—ASSESSABILITY—BUSINESS PROFITS—PROFITS FROM OTHER SOURCES—CASUAL AND NON-RECURRING RECEIPT—DEPOSIT OF RS. 100, WHETHER COSTS—INCOME TAX ACT (XI OF 1922), SECTIONS 4 (3) (vii), 10, 12.

In consideration of a sum of Rs. 10,000 advanced by the assessee to a mining engineer for working certain mines the latter promised to pay the assessee, in the event of the mines being sold, a sum equal to one-third of the total consideration which he might receive by the sale of all the mining areas held by him. The mines were sold and under this agreement the assessee received £ 6,000 in cash and shares of the face value of £9,000. Income-tax was claimed from the assessee on the amount of £ 6,000 : Held, *that the £6,000 which had accrued to the assessee did not form part of the profits or gains of any business carried on by the assessee within Section 10 of the Income Tax Act ; nor was it profits or gains 'derived from other sources' within Section 12 ; it was a receipt, not being a receipt arising from business, of a casual and non-recurring nature within Section 4 (3) (vii) of the Income Tax Act and as such not assessable to income-tax.*

Held, *further, that the fee of Rs. 100, which must accompany an application for reference under Section 66 (2), Income-tax Act, forms part of the costs of, and incidental to, the reference, which the Court in its discretion may award in a proper case to the assessee.*

Reference made by the Commissioner of Income Tax, Burma, under Section 66 (2) of the Income Tax Act, 1922 (Civil Reference No. 11 of 1933).

The facts are stated in the judgment of Page, C.J.

Eggar, for the Crown.

Foucar, for the assessee.

PAGE, C.J.—It appears that the assessee, who is a tin mine owner and tin mine worker, lent certain sums of money from time to time to a Mr. Warwick Smith for the purpose of enabling Mr. Warwick Smith to work a tin area known as Tonbu-chaung. The sums which the assessee lent to Mr. Warwick Smith for this purpose between 1924 and 1926 amounted to over Rs. 20,000. No part of this loan has been repaid to the assessee. In 1927 Mr. Warwick Smith again approached the assessee with a view to obtaining from him a further loan to enable Mr. Warwick Smith to take a lease of Tonbu-chaung. The assessee was disinclined to lend Mr. Warwick Smith any further sum, but eventually was persuaded to lend him two sums of Rs. 3,000 and Rs. 5,000. In March 1928 Mr. Warwick Smith, who had been working the mine at Tonbu-chaung informed the assessee that he thought that there was a reasonable prospect of selling it, but that there was a certain amount of work to be done before the examining engineers arrived, and that it was necessary for Mr. Warwick Smith to find another Rs. 10,000 in order that the work should be carried through. The assessee was not prepared to lend Mr. Warwick Smith this sum without some sort of security, but on 14th March, 1928, he was persuaded to enter into the following agreement:

" In consideration of the sum of Rs. 10,000 (Rupees ten thousand only), the receipt of which sum from James Ingram Milne is hereby acknowledged by me, I, the undersigned, S. Warwick Smith, Mining Engineer of Palauk, Palaw Township, Mergui District, Burma, his heirs, executors and assigns hereby agree and promise to pay to the aforesaid James Ingram Milne, Mining Engineer of Palauk, Palaw Township, Mergui District, Burma, his heirs, executors and assigns a sum equal to one-third of the total consideration received by me, my heirs, executors and assigns directly or indirectly for the sale of all mining areas at present held by me under Mining Lease or Prospecting Licence or under application by me for mining Lease or Prospecting Licence, in the Palauk Village tract of

Palaw Township, Mergui District, Burma, the amount payable to be paid as and when the sale consideration is received by me, my heirs, executors and assigns."

In my opinion that transaction upon the face of it was a private venture by which the assessee took the chance of obtaining repayment of the sum which he had lent to Mr. Warwick Smith in the event of the property being sold and a profit accruing from the proceeds of the sale. It does not appear to me that it was a business transaction in any sense, but was only a mode by which the assessee sought to secure himself against loss if he lent to Mr. Warwick Smith this further sum of Rs. 10,000. In the event it turned out to be a profitable investment, because the mine was sold in 1929 for £ 25,000 in cash and £ 45,000 in shares, and the assessee received in cash under the agreement £ 6,000 and shares of the face value of £ 9,000. It is in respect of this £ 6,000 that income-tax is claimed from the assessee. The ground upon which the assessment is supported is that the assessee "deals in mines or mining concessions", which I take to mean that he carries on the business of buying and selling mines or mining concessions and that the effect of the agreement was that the assessee bought for Rs. 10,000 a third share in the mining properties which were the subject-matter of the agreement.

The only material before the Income Tax Officer upon which he could have found that the assessee was carrying on the business of buying and selling mines or mining concessions was that in 1919 the assessee had in fact sold a tin dredging area to the Indo-Burma Corporation, Limited. We are not concerned in this reference to determine whether or not there were materials upon which the Income Tax Officer could find that the assessee carried on the business of dealing in mining concessions, because it is clear, to my mind, upon the face of the agreement that the transaction out of which the £6,000 accrued to the assessee formed no part of any business that the assessee was carrying on. In my opinion there were no materials upon which the Income Tax Officer could hold that the receipt in question, *viz.*, £ 6,000 was a taxable profit. There was no evidence upon which the Income Tax Officer could hold that the effect of the agreement under consideration was that the assessee

actually bought a third share in the mining properties which were the subject-matter of the agreement.

The assessee acquired no right or interest whatever in the property, the effect of the agreement being that in consideration of Rs. 10,000 lent by the assessee to Mr. Warwick Smith, Mr. Warwick Smith undertook, in the event of the property being sold, to allocate and pay to the assessee one-third of the total consideration received by Mr. Warwick Smith. In my opinion the £6,000 under consideration did not form part of the profits or gains of any business carried on by the assessee within Section 10, Income Tax Act; nor was it profits and gains derived from other sources within Section 12 because, as I understand the transaction, it was a receipt, not being a receipt arising from business, of a casual and non-recurring nature within Section 4 (3) (vii) of the Act. For these reasons, in my opinion, the answer to the question propounded is in the negative. The question of costs is adjourned; the matter can be mentioned later.

DAS, J.—I agree.

MYA BU, J.—I agree.

[The case was further considered in respect of costs and the refund of Rs. 100 deposited by the assessee with his application for reference to the High Court.]

PAGE, C. J.—A question relating to procedure in Income-tax References is involved in this application. Under Section 66 (2):

"Within sixty days of the date on which he (*i.e.* the assessee) is served with notice of an order under Section 31 or Section 32 or of a decision by a Board of Referees under Section 33A, the assessee in respect of whom the order or decision was passed may by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order or decision, and the Commissioner shall, within sixty days of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court: Provided that if in exercise of his power of revision under Section 33, the Commissioner decides the question,

the assessee may withdraw his application, and if he does so, the fee paid shall be refunded."

Sub-section (6) states :

"Where a reference is made to the High Court on the application of an assessee, the cost shall be in the discretion of the Court."

Now, it has been the practice of the Income-tax authorities in Burma to retain this fee of Rs. 100 whether or not a reference to the High Court is made under Section 66; and if the matter had been free from authority I should have been inclined to think that the view taken by the Income-tax authorities was right. It seems to me that the fee of Rs. 100 which has to be paid at the time when an application under Section 66 (2) is filed, was intended partly to cover the expenses of the Commissioner that would be incurred by reason of the application, and partly as a safeguard against frivolous applications; and in such circumstances it would not be unreasonable to hold that the fee was not recoverable by the assessee. On the other hand the High Courts of Madras, Allahabad, Patna and Lahore have held that this fee of Rs. 100 is to be treated as part of the costs of the reference deposited by way of security, and for this reason it has been held that the fee forms part of the costs of, and incidental to, the reference which may be refunded to the assessee in the discretion of the Court under Section 66 (6). In matters of procedure it is important wherever it is possible, that the practice of the High Courts should be uniform and we are not prepared to differ upon this matter from the Madras, Allahabad, Patna and Lahore High Courts. The result is that, in our opinion, the fee of Rs. 100, which must accompany an application for a reference under Section 66 (2) forms part of the costs of, and incidental to, the reference which the Court in its discretion may award in a proper case to the assessee. We order that the assessee should have his costs, ten gold mohurs, and in addition that the Rs. 100 that he has deposited under Section 66 (2) should be refunded to him.

DAS, J.—I agree.

MYA BU, J.—I agree.

Order accordingly.

[IN THE CALCUTTA HIGH COURT.]

IN THE MATTER OF MESSRS. BURN & CO.

C. C. Ghose, A.C.J., Costello, J., and Mallik J.

August 25, 1933.

INCOME-TAX—REASSESSMENT—CANCELLATION OF ASSESSMENT—REASSESSMENT AFTER ONE YEAR—LEGALITY—'IN THE YEAR,' MEANING OF—WHEN INCOME 'ESCAPES ASSESSMENT'—NOTICE UNDER SECTION 34—ESSENTIALS—INCOME-TAX ACT (XI OF 1922), Section 34.

Two firms M & Co. and B & Co. were assessed as separate firms until the year 1927-28 when the Income-tax Officer proceeded to assess M & Co. on the total income of M & Co. and B & Co. jointly on the ground that M & Co. had purchased B & Co. Pending the decision of the High Court on the legality of the joint assessment, assessments were made also for 1928-29 and 1929-30 on M & Co. on the income of both the firms. On the 16th May, 1930, the High Court held that the two firms ought to have been assessed separately. On the 8th November, 1930, B & Co. were assessed in respect of the years 1927-28, 1928-29 and 1929-30 on their income alone. The assessment in respect of the years 1928-29 and 1929-30 was however cancelled on the 30th March, 1931, on the ground that proceedings had not been duly initiated against B & Co. and notice of reassessment under Section 34, Income-tax Act, was issued to B & Co. on the 31st March, 1931, in respect of the years 1928-29 and 1929-30:

Held, *that the expression 'in any year' in Section 34 must be read as meaning the year during which the proceedings in assessment in respect of that very year should have been initiated, that is, the actual twelve months in which an assessment would normally and properly be made, and the notice served on B & Co. under Section 34 in respect of the year 1928-29 was not a valid notice inasmuch as it was not served within the period of limitation allowed by that section.*

Obiter: *In the circumstances of the case the income of B & Co. in respect of the year 1928-29 did not 'escape assessment' within the meaning of Section 34.*

Held also, *that Section 34 does not prescribe any standard form of notice; all that the section requires is that a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 shall be served.*

Case stated by the Commissioner of Income-tax, Bengal, under Section 66 (2) of the Income-tax Act, XI of 1922.

The statement of the case made by the Commissioner was as follows:—

" The assessments out of which the questions at issue in this statement of case arise, are assessments of the years 1928-29 and 1929-30 made under Section 34 of the Income-tax Act on the 19th February, 1932.

2. This matter has a very long history, which it is necessary to set out at length in order that the full facts of the case may be understood and appreciated. Until the year 1927-28 assessment was made on Messrs. Martin & Company and on Messrs. Burn & Company as separate assessees, but in that year when it came to the notice of the Income-tax Officer that Messrs. Martin & Company had acquired by purchase the firm of Messrs. Burn & Company, he proceeded to make a joint assessment on Messrs. Martin & Company on the total income from both firms. Messrs. Martin & Company objected to this joint assessment and eventually the matter reached the High Court in an application under Section 66 (2), where it was eventually held that the firm of Messrs. Burn & Company was purchased not with any funds belonging to the firm of Messrs. Martin & Company but with other funds, the private property of the individual persons who are partners in Messrs. Martin & Company and further that the acquisition of Messrs. Burn & Company by Messrs. Martin & Company was a separate venture, which should have no connection with Messrs. Martin & Company. This order was dated the 16th May, 1930, and in accordance with that order the assessment on Messrs. Martin & Company as a registered firm was modified, the profits of Messrs. Burn & Company which had been added to their income in that year for assessment purposes by the Income-tax Officer being deducted. In view of the fact however, that Messrs. Burn & Company had filed a return of income in response to a notice issued under Section 22 (2) in respect of their own income for the previous year in the year 1927-28 the Income-tax Officer on receipt of the High Court's order proceeded to make an assessment under Section 23 (1) on

Messrs. Burn & Company on the basis of that return. The assessee challenged the validity of this assessment made under that section and sub-section and asked for a reference under Section 66 (2) of the Act to the High Court, which was duly made by the Commissioner. In that reference the following three questions of law were formulated and all three were decided against the assessee on the 18th February, 1932.

> "1. Whether the assessment made under Section 23 (1) on the petitioners on 8th November, 1930, for the year 1927-28 in pursuance of the notice under Section 22 (2) issued on them on 7th April, 1927, was a legal assessment ?
>
> "2. Whether proceedings can now lie against Messrs. Burn & Company in view of the fact that final and conclusive assessments have now been made on Messrs. Martin & Company and on their individual partners ?
>
> "3. Upon a true construction of the Indian Income-tax Act must not any assessment be completed within the year of assessment or in the event of such assessment not being so completed is not the only remedy open to the Income-tax Authorities to proceed under Section 34 ?"

3. While the matter of the legality of the assessment made in 1927-28 on Messrs. Martin & Company on the joint income from both the firms was still pending before the High Court, the assessments of the years 1928-29 and 1929-30 were completed and were made as the 1927-28 assessment had been made on Messrs. Martin & Company on the joint income from the two firms. The assessee had taken exception to this procedure and it was agreed between him and the Income-tax Authorities that the decision of the High Court in the 1927-28 assessment would govern the assessment of 1928-29 and 1929-30. Accordingly, when the High Court held that the 1927-28 assessment was irregular and that Messrs. Martin & Company could not be assessed jointly on the income of Messrs. Martin & Company and Messrs. Burn & Company, the 1928-29 and 1929-30 assessments on Messrs. Martin & Company were modified

accordingly. As it was found, however, that Messrs. Burn & Company, had filed returns of their separate incomes in the years 1928-29 and 1929-30, the Income-tax Officer proceeded to make an assessment under Section 23 (1) on the basis of these returns after the High Court's decision had been received. The assessee, Messrs. Burn & Company objected and the case eventually came before the Commissioner in an application under Section 66 (2) in which he held that these assessments were irregular in view of the fact that these returns had been filed by Messrs. Burn & Company *suo motu* and not in compliance with a notice issued under Section 22 (2). He therefore cancelled these assessments by his order, dated the 30th March, 1931, and directed the Income-tax Officer to make assessments under Section 34 of the Act on the income which should have been assessed in the years 1928-29 and 1929-30. Notices under Section 34 were served on the 31st March, 1931, on Messrs. Burn & Company, the assessments were duly made, appeals were filed and ultimately I have been asked in an application under Section 66 (2) to refer certain questions of law arising out of these assessments to the High Court.

4. The following dates in connection with the assessments of the two years out of which these questions arise and the assessment of the prior year 1927-28 are relevant :—

17th January, 1929.—Assessment for 1928-29 made on Messrs. Martin & Company on income including the income of Messrs. Burn & Company.

16th May, 1930.—Order of High Court cancelling the assessment for 1927-28 made on Messrs. Martin & Company on the joint income from the two firms.

4th June, 1930.—Commissioner's order directing the assessment of 1927-28 to be revised in conformity with the High Court's order and asking also that the assessments for 1928-29 and 1929-30 should be revised in accordance with the agreement between the Commissioner and the assessee, that the High Court's decision in the 1927-28 assessment would govern those assessments also.

24th October, 1930.—Revised assessment on Messrs. Martin & Company for 1927-28, 1928-29 and 1929-30 excluding the income of Messrs. Burn & Company.

8th November, 1930.—Assessment on Messrs. Burn & Company in respect of the income for that firm only for the years 1927-28, 1928-29 and 1929-30.

30th March, 1931.—Cancellation of the assessments for 1928-29 and 1929-30 on Messrs. Burn & Company by the Commissioner under Section 33 on an application for reference to the High Court on the ground that the proceedings for assessment had not been legally initiated.

31st March, 1931.—Issue of notice under Section 34 on Messrs. Burn & Company in respect of the income which should have been assessed in 1928-29 and 1929-30.

19th February, 1932.—Completion of these proceedings under Section 34 by the Income Tax Officer and assessment.

5. Arising out of the 1928-29 assessment six questions of law have been formulated by the assessee under Section 66 (2). Question (1) is drafted as follows :—

"Did the terms of the notice in this case, dated 31st March, 1931, purporting to be served under Section 34 of the Indian Income Tax Act, 1922, constitute a valid notice under the said section ?"

I refer this question to the Hon'ble High Court.

The notice issued under Section 34 in this case runs as below :—

"Notice under Section 34 of the Indian Income Tax Act (XI of 1922).

INCOME TAX OFFICE,

Companies District (1),

1, *Hare Street, Calcutta.*

DATED THE 31ST MARCH, 1931.

To

Messrs. Burn & Company,

12, Mission Row, Calcutta.

Whereas your income from business was assessed in the assessment year 1928-29 jointly with the income of Messrs. Martin & Company and whereas, the Hon'ble High Court by their order dated the 16th May, 1930, directed that a joint assessment of the income of Messrs. Martin & Company and Messrs. Burn & Company could not be made and whereas in consequence of the said order your income for the 15 months ended 31st July, 1927, escaped assessment in the assessment year 1930-31, I hereby require you to deliver to me not later than the 5th May, 1931, or within 30 days of the receipt of this notice, a return in the attached form of your income from all sources which was assessable for the year ending 31st March, 1929.

W. A. PHILLIPPE,

Income Tax Officer."

and the argument apparently is that this is not a valid notice. The standard form of notice prescribed by the Central Board of Revenue is in the form noted below:—

Notice under Section 34 of the Indian Income Tax Act (XI of 1922).

INCOME TAX OFFICE,

DATED

To

Whereas I have reason to believe that your income from (source) which (a) should have been

(b) " has been assessed in the financial year ending the 31st March, 19 ,

(*a*) has $\frac{\text{wholly}}{\text{partially}}$ escaped assessment,

(*b*) has been assessed at too low a rate,

and I therefore propose

(*a*) to assess the said income that has escaped assessment,

(*b*) to reassess your said income at the correct rate.

I hereby require you to deliver to me, not later than....or within 30 days of the receipt of this notice, a return in the attached form of your income from all sources which was assessable in the said year ending the 31st March, 19 .

"Income Tax Officer."

The answer to the question formulated would appear to be that there is no statutory form of notice under Section 34 and that all that Section 34 requires is that a notice should be served containing all or any of the requirements which may be included in a notice under Section 22 (2). In this connection, *Sundaram* observes at page 844 of the 3rd edition of his *Income Tax Law* :—

> "If the information on which the supplementary assessment is proposed to be made has already been furnished by the assessee himself, though in some other connection, and it has also been verified by him, it is strictly speaking unnecessary for the Income Tax Officer to issue a notice, though in practice the assessee is probably given an opportunity of being heard, on the analogy of the provision in Section 35."

6. Questions 2 to 6 as formulated below :—

"2. Does the said Section 34 empower an Income Tax Officer to serve a notice thereunder on a date later than the last day of a period of 12 (Gregorian) calendar months calculated from the last day of the financial year following the financial year in which the profits or gains sought to be taxed accrued, arose or were received, or are, under the provisions of the Act, to be deemed to have accrued or arisen or to have been received ?

3. Regard being had to the provisions of the said Section 34, should it be held that profits or gains

escape assessment in any year other than the financial year following that in which such profits or gains accrue or arise or are received or are under the provisions of the said Act, to be deemed to have accrued, arisen or to have been received?

4. Does the assessment of another person in respect of profits and gains affect the period of limitation prescribed by the said Section 34 as against the person who should have been assessed in respect of such profits and gains?

5. If profits or gains are assessed as those of another assessee, should such profits or gains, as against the person who was liable to pay tax thereon, be held to have escaped assessment within the meaning of the said Section 34?

6. Having regard to the fact that we were assessed on such profits or gains on the 8th day of November, 1930, and that such assessment was cancelled by the Order of the Commissioner, dated the 30th day of March, 1931, can such profits or gains be said to have escaped assessment within the meaning of Section 34 and justify any proceedings under the said section?"

appear to me to resolve themselves into two questions as below:—

"1. In the circumstances of this case when did the income which should ordinarily have been assessed in 1928-29 escape assessment?

2. Was the notice served on the assessee in this case under Section 34 a notice served within the period of limitation allowed by that section?"

I accordingly refer only these two questions to the Hon'ble High Court. The assessee's argument apparently is that Section 34 could not be invoked in this case, because the notice under that section was served more than one year after the year

in which the assessment should ordinarily have been made and secondly, because the income in question had, in fact, not escaped assessment having been assessed in the hands of the wrong person or in the alternative, if it has escaped at all, it escaped assessment in the year 1928-29 and proceedings under Section 34 could therefore be opened only before the end of the year 1929-30. Section 34 runs as follows :—

> "If for any reason income, profits or gains chargeable to Income Tax has escaped assessment in any year or has been assessed at too low a rate, the Income Tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section."

and what we are concerned with here is the interpretation of the expression " if for any reason income, profits or gains has escaped assessment in any year." I do not for a moment think, it can be argued that income has not escaped assessment unless it has not been assessed at all and the expression "for any reason" implies that there may be a great number of circumstances in which income may escape assessment. Further, the absurdity of the contention that income has not escaped assessment unless when no effort at all has been made to assess it is evident from the fact that Section 34 deals with two contingencies.

(*a*) Where income has escaped assessment.

(*b*) Where it has been assessed at too low a rate.

Now, if the argument which I have referred to above is sound, it follows that income has been assessed at too low a rate only when no effort at all has been made to assess it at the correct rate, which is *ex hypothesi* absurd. Again, in the case of

Commissioner of Income Tax, Madras v. *Sri Krishna Chandra Gajapati Narayana Deo, Raja of Parlakimedi,* [I. L. R. 49 Mad. 22; 2 I. T. C. 104], the Madras High Court held that " the expression escaped assessment " in this section applies to cases where the Income Tax Officer has deliberately adopted an erroneous construction of the Act just as much as to cases where the Officer has not considered the matter at all, but simply omitted the assessable profits from his view and from his assessment." Further, their Lordships in the Calcutta High Court in the Reference arising out of the 1926-27 assessment on this same assessee have held that so long as the question as to the right method of assessment was *sub judice*, Burn & Company had not escaped assessment, while they have observed in the case of *Lachhiram Basantlal* and *Basantlal Nathani* [I. L. R. 58 Cal. 909 at 912], decided on the 24th November, 1930, that " at all events income has not escaped assessment, if there are pending at the time proceedings for the assessment of the assessee's income, which have not yet terminated in a final assessment thereof."

7. One line of assessee's argument, so far I can gather from the questions formulated by him, is as follows :—

Section 22 of the Act stipulates the time within which proceedings should be initiated. No such proceedings were initiated against the assessee during the period specified in that section, but his income was assessed at the hands of a wrong person. This wrong assessment was ultimately set aside, so that now the income has altogether escaped assessment. His case appears to be that the assessment of a wrong person and ultimate cancellation of that assessment are altogether irrelevant considerations and that the income at his hand escaped assessment as soon as the year during which proceedings in assessment should have been initiated passed without such initiation and that when Section 34 of the Act speaks of income escaping assessment it refers to escapement, so far as the assessee is concerned. But this is not in accordance with the plain interpretation of Section 34 which refers to income, profits or gains having escaped assessment, while according to the assessee's interpretation the section should run as follows :—

> "If for any reason an assessee has escaped assessment in respect of any income, profits or gains chargeable to income-tax in any year or has been assessed at too low a rate, the Income Tax Officer may................"

In my view, if the income, as a matter of fact, has been assessed, no matter at whose hands, it does not escape assessment within the meaning of this section. A particular assessee may escape assessment on any income and yet the income may not escape assessment. If income which belongs to A is assessed at the hands of B and B's assessment is later set aside, the income in question only then escapes assessment and it is only then that Section 34 comes into operation. So long as B is assessed in respect of A's income, the income does not escape assessment though A might have escaped assessment, and so long as no proceedings were initiated against A during the year of assessment as required by Section 22 (2) of the Act, he could not subsequently be assessed under Section 34 so long as B remains assessed in respect of that income, but as soon as B's assessment is cancelled, the income escapes assessment and A is liable to be proceeded against under Section 34. It would be improper to read into that section words which are not there. An assessee escaping assessment is not the same as income escaping assessment, and when a section speaks of income escaping assessment, it would be wrong to recast it or interpret it as though it spoke of an assessee escaping assessment in respect of any income.

8. Here, the position is that there was an assessment of this income as the income of Messrs. Martin & Company which must be presumed to be valid until it was held or declared to be otherwise and it was held or declared to be otherwise as the result of the High Court's Order, dated the 16th May, 1930, and declared to be otherwise in the Commissioner's order, dated the 4th June, 1930, and his subsequent order, dated the 30th March, 1931. In my view, therefore, the earliest possible date from which the period of limitation under Section 34 can be held to run in this case is the date of the Commissioner's order, dated the 4th June, 1930, directing that this assessment should be

dealt with in accordance with the decision of the High Court passed on the assessment of an earlier year on the 16th May, 1930. In my opinion, the correct view is that the period of limitation should run from the 30th March, 1931, that is, the date on which the Commissioner cancelled the first separate assessment on Messrs. Burn & Company and directed the Income-Tax Officer to make a fresh assessment under Section 34.

9. The assessment of the year 1929-30 made under Section 34 presents fewer difficulties. Arising out of that assessment the first question formulated runs as follows :—

> " 1. Did the terms of the notice in this case, dated the 31st March, 1931, purporting to be served under Section 34 of the Indian Income-tax Act, 1922, constitute a valid notice under the said section ? "

I refer this question with which I have already dealt in paragraph 5 of this Statement of Case and on which I have expressed my opinion to the High Court.

10. This was an assessment which should ordinarily have been made in the year 1929-30 and even in accordance with the contention advanced by the assessee with regard to the correct interpretation of Section 34 of the Act when dealing with the 1928-29 assessment, the notice under Section 34 was served in due time, for it was served before the end of the year following the year 1929-30. Two other questions of law have been framed arising out of this assessment and these run as below :—

> " 2. If profits or gains are assessed as those of another assessee, should such profits or gains, as against the person who was liable to pay tax thereon, be held to have escaped assessment within the meaning of the said Section 34 ? "

> " 3. Having regard to the fact that we were assessed on such profits and gains on the 8th day of November, 1930, and that such assessment was cancelled by the order of the Commissioner, dated the 30th day of March, 1931, can such profits or gains be said to have escaped assessment within the

meaning of Section 34 and justify any proceedings under the said section."

I refer these questions to the High Court. The argument here apparently is that income had not escaped assessment, but on the other hand, had been assessed as the income of a person to whom it did not really belong. The counter arguments advanced by me when dealing with the similar question in connection with the 1928-29 assessment cover this case also and it is unnecessary for me to repeat them. My view is that in this case the earliest possible date on which, by any stretching of the law in favour of the assessee, the period of limitation should run is the 4th June, 1930, but that correctly speaking, this income escaped assessment on the 30th March, 1931, the date on which the Commissioner cancelled the first assessment made on Messrs. Burn & Company on their income as a firm.

11. Question 3 set out in the above paragraph also calls for some comments. The contention here appears to be that when an income is assessed at the right hands, but ultimately the assessment is set aside by a higher Income-tax authority in continuation of the same assessment proceedings, this order setting aside the assessment is final in so far as the particular income is concerned and the Income Tax Officer cannot again proceed to assess the same. Apparently he would argue that when an assessment is set saide on appeal or in exercise of the powers of review, the Income-Tax Officer has no jurisdiction to nullify the effect of this order by renewing the proceedings against the assessee in respect of the same income and the order setting aside the assessment amounts to a determination that there should be no assessment and consequently the income does not escape assessment but is rendered unassessable. The answer to this question depends upon the actual decision of the Commissioner, dated the 30th March, 1931, referred to in the question itself. In that decision, the Commissioner did not decide that the income was not chargeable. His decision was that the proceedings which he cancelled in that order were not properly initiated and further he embodied in that order setting aside that assessment a direction to the Income Tax Officer to make a fresh assessment as he had jurisdiction to do. This order of the

Commissioner was never assailed and there is no substance, in my view, in this question.

12. It is respectfully requested that their Lordships' decision in this case be communicated to me in due course."

The case was heard on the 4th August, 1933.

Pugh, for the assessees.

The Advocate-General (with *R. B. Pal*), for the Commissioner.

On the 25th August, 1933, their Lordships pronounced the following

JUDGMENT.—This matter came before us on a case stated by the Commissioner of Income Tax, Bengal, under Section 66 (2) of the Income Tax Act (Act XI of 1922). The assessments out of which the questions at issue arise are assessments of the years 1928-29 and 1929-30 said to have been made under Section 34 of the Act on the 19th February, 1932. It is necessary to relate at some length the history of the matter in order that it may be clear how the points which we have to determine have arisen. Down to the year 1927-28 assessment was made on a firm named Messrs. Martin & Company, and upon the present applicants, Messrs. Burn & Company as separate assessees but in that year when it came to the notice of the Income Tax Officer that Messrs. Martin & Company had apparently acquired by purchase the firm of Messrs. Burn & Company the Income Tax Officer proceeded to make an assessment on Messrs. Martin & Company, on the total income of both these firms jointly. Messrs. Martin & Company, made an objection to this joint assessment and as a result of that objection the matter eventually came before this Court on an application under Section 66 (2) when it was held that the firm of Messrs. Burn & Company had been purchased not with any funds belonging to the firm of Messrs. Martin & Company but with other funds which were the private property of the individual persons who happened to be the partners of Messrs. Martin & Company and further that the acquisition of the firm of Messrs. Burn & Company by these individuals was a separate venture which should have no connection with Messrs. Martin & Company for the purpose of assessment to income-tax. The order

of this Court was dated the 16th May, 1930, and in accordance with that order the assessment on Messrs. Martin & Company as a registered firm was modified and the profits of Messrs. Burn & Company which had been added to the income of Messrs. Martin & Company in that year by the Income Tax Officer for assessment purposes were deducted. In view of the fact that Messrs. Burn & Company had filed a return of income in pursuance to a notice issued under Section 22 (2) in respect of their own income for the previous year, that is, the year 1927-28, the Income Tax Officer on receipt of the High Court's order proceeded to make an assessment under Section 23 (1) on Messrs. Burn & Company on the basis of that return. Messrs. Burn & Company challenged the validity of that assessment made under Section 23 (1) and asked for a Reference under Section 66 (2) of the Act to the High Court and a Reference was duly made by the Commissioner of Income Tax. In that Reference certain questions of law were formulated and all of them were decided against Messrs. Burn & Company as assessees on the 18th February, 1932. While the matter of the legality of the assessment made in the year 1927-28 on Messrs. Martin & Company based on the joint income of both the firms was still pending before this Court the assessments of the years 1928-29 and 1929-30 were completed. They were made just as the 1927-28 assessment had been made on Messrs. Martin & Company on the joint income from the two firms. The assessees again took exception to this procedure and it was then agreed between them and the Income Tax Authorities that the decision of the High Court as regards the 1927-28 assessment should govern the assessment for the years 1928-29 and 1929-30. Accordingly when the High Court held that the 1927-28 assessment was irregular and that Messrs. Martin & Company could not be assessed jointly on the income of themselves and Messrs. Burn & Company the 1928-29 and 1929-30 assessments on Messrs. Martin and Company were once more modified. In the meantime, however, Messrs. Burn & Company, the present applicants, had filed returns of their separate income in respect of the years 1928-29 and 1929-30. The Income Tax Officer therefore after the judgment of the High Court previously mentioned, proceeded to make an assessment under Section 23 (1) on the basis of those returns,

To this Messrs. Burn & Company objected and the matter ultimately came before the Commissioner of Income Tax on another application under Section 66 (2) and the Commissioner of Income Tax thereupon came to the conclusion that those assessments were indeed irregular in view of the fact that the returns which had been filed by Messrs. Burn & Company had been filed *suo motu* and not in compliance with any notice issued under Section 22 (2). The Commissioner of Income Tax, upon that cancelled those assessments by an order dated the 30th March, 1931, and further directed that the Income Tax Officer should take steps to make assessments under Section 34 of the Income Tax Act on the income with should have been assessed in the years 1928-29 and 1929-30. On the 31st March notices under Section 34 were duly served on Messrs. Burn & Company and assessments were duly made. Appeals against those assessments were preferred and finally the Commissioner of Income Tax was asked in an application under Section 66 (2) to refer certain questions of law arising out of those assessments to this Court and these are the questions with which we are now concerned. The Commissioner of Income Tax in his statement of the case has set out certain dates in connection with the assessments of the two years out of which those questions arise and it may perhaps be desirable that we should here reproduce them. The material dates and events are as follows :—

17th January, 1929.—Assessment for the year 1928-29 made on Messrs. Martin & Company on income including the income of Messrs. Burn & Company.

16th May, 1930.—Order of the High Court cancelling the assessment for the year 1927-28 made on Messrs. Martin & Company on the joint income from the two firms.

4th June, 1930.—Order of the Commissioner directing the assessment of the year 1927-28 to be revised in conformity with the order of the High Court and asking also that the assessments for the years 1928-29 and 1929-30 should be revised in accordance with the agreement between the Commissioner and the assessees, *viz.*, that the decision of the High Court in the matter of the 1927-28 assessment would govern those assessments also.

24th October, 1930.—Revised assessment on Messrs. Martin & Company for the years 1927-28, 1928-29 and 1929-30 excluding the income of Messrs. Burn & Company.

8th November, 1930.—Assessment on Messrs. Burn & Company in respect of the income of that firm only for the years 1927-28, 1928-29 and 1929-30.

30th March, 1931.—Cancellation of the assessments for 1928-29 and 1929-30 on Messrs. Burn & Company by the Commissioner under Section 33 of the Act on an application for a Reference to the High Court on the ground that the proceedings for assessment had not been legally initiated.

31st March, 1931.—Issue of notice under Section 34 on Messrs. Burn & Company in respect of the income which should have been assessed in the years 1928-29 and 1929-30.

19th February, 1932.—Completion of these proceedings under Section 34 by the Income Tax Officer and assessment.

The Commissioner of Income Tax states that arising out of the 1928-29 assessment six questions of law were formulated by the assessees under Section 66 (2). The first question runs as follows:—

"Did the terms of the notice in this case, dated 31st March, 1931, purporting to be served under Section 34 of the Indian Income Tax Act, 1922, constitute a valid notice under the said section?"

That question has been referred by the Commissioner to this Court. As regards the other questions put forward by the assessees they seem to resolve themselves into these two questions:—(1) In the circumstances of this case when did the income which should ordinarily have been assessed in 1928-29 escape assessment? (2) Was the notice served on the assessees in this case under Section 34 a notice served within the period of limitation allowed by that section? These two questions relating to the 1928-29 assessment were also referred by the Commissioner to this Court.

Now, as regards the 1929-30 assessment the questions formulated were these: "Did the terms of the notice in this case, dated the 31st March, 1931, purporting to be served under Section 34 of the Indian Income Tax Act, 1922, constitute a valid

notice under the said section ? " The Commissioner points out in his statement of the case that this was an assessment which should ordinarily have been made in the year 1929-30 and he says that even in accordance with the contention advanced by the assessees with regard to the correct interpretation of Section 34 of the Act the notice under Section 34 was in fact served in due time, for it was served before the end of the year following the year 1929-30. It is not necessary that we should say very much with regard to the questions put forward in connection with the assessment of the year 1929-30, because Mr. Pugh who appeared on behalf of the applicants quite early in his argument admitted that the notice dated the 31st March, 1931, in respect of the year 1929-30 was served within the time limited under Section 34 of the Act and he abandoned the contention that by reason of the actual form of the notice it was not a valid notice under that section. What we are really now concerned with, therefore, is the question whether or not the notice dated the 31st March, 1931, requiring Messrs. Burn & Company to deliver to the Income-tax Officer not later than the 5th May, 1931, or within 30 days of the receipt of the notice a return of their income from all sources which were assessable for the year ending the 31st March, 1929, was in form a good notice, and otherwise, even if it were, whether it nevertheless constituted a valid notice under Section 34 of the Act. A copy of the actual notice is set out on page 41 of the paper-book. It is headed " Notice under Section 34 of the Indian Income Tax Act (Act XI of 1922)." It is quite true that the notice was in the form of a letter instead of being in the common form prescribed by the Central Board of Revenue but it was conceded by Mr. Pugh that in fact all the details provided for in that form of notice had, in fact, been dealt with in the letter and we gathered the impression that Mr. Pugh did not seriously desire to stress this particular point. It is to be observed that there is no standard form of notice prescribed in Section 34 itself. All that the section requires is that a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 shall be served. Mr. SUNDARAM in his well-known text book " *The Law of Income Tax in India* " 3rd Edition at page 844 says: " If the information on which the supplementary assessment is

proposed to be made has already been furnished by the assessee himself, though in some other connection, and it has also been verified by him, it is strictly speaking unnecessary for the Income Tax Officer to issue a notice, though in practice the assessee is probably given an opportunity of being heard, on the analogy of the provision in Section 35." We are quite satisfied that the form of the notice which was given on the 31st March, 1931, sufficiently and properly complied with the requirements of Section 34 of the Income Tax Act. The substantial questions which we have to decide as regards 1928-29 assessment is first of all the question whether on the ground that the income of the year 1928-29 did not escape assessment, Section 34 can be made applicable at all. Section 34 reads as follows :—" If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22, and may proceed to assess or reassess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section : Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be."

The argument advanced on behalf of the applicants Messrs. Burn & Company is that Section 34 ought not to have been invoked in this case at all because the income concerned had in fact not escaped assessment. It is to be observed that Section 34 can only be brought into operation if for any reason income chargeable to income-tax has escaped assessment in any year. Mr. Pugh has argued with great cogency that the income of Messrs. Burn & Company for the year 1928-29 did not escape assessment though the liability for the income-tax may have been placed on the wrong shoulders. It is to be borne in mind from the history of the case which we have narrated that the assessment for the year 1928-29 was completed while the matter of the assessment

for the year 1927-28 was still pending before the High Court. The assessment was made on Messrs. Martin & Company on the 17th January, 1929. On the 19th December, 1928, Messrs. Burn & Company had written to Mr. Martin who was then the Income Tax Officer a letter in which they stated that they proposed to close the accounts of their firm in the month of July in each year instead of on April 30th as theretofore. They also pointed out that under Section 2, sub-section 11 (a), they required the consent of the Income Tax Officer to do that and they asked to be informed of the conditions that the Income Tax Officer would think fit to impose on them. They concluded the letter by saying "We propose making the alteration for the purpose of assessing tax for the year 1928-29. In reply to that letter the Income Tax Officer on the 10th January, 1929, informed Messrs. Burn & Company that he was prepared to allow the alteration in the accounting period provided the firm paid tax on fifteen (15) months' profits in this assessment for 1928-29. In reply Messrs. Burn & Company on the 11th January, 1929, wrote to the Income Tax Officer, Mr. Martin, a further letter in which they said "With reference to your letter No. R-F 15 of the 10th instant we have the honour to enclose herewith return under Section 22 (2) of the Indian Income Tax Act, 1922, for the official year 1928-29." It will be seen therefore that Messrs. Burn & Company did actually make a return for the year 1928-29 and that such return was in response (sic) in accordance with the conditions and requirements. We think it not unreasonable to hold that the assessment was made in response to a notice under the Act. In the circumstances we find it not a little difficult to understand how it came about that the Commissioner took the view that the return filed by Messrs. Burn & Company had been filed, as he says, *suo motu* and it would seem there was no necessity for the Commissioner to have made the order of 30th March, 1931, cancelling that assessment. However, be that as it may, we should be inclined to hold that in all the circumstances of the case the income of Messrs. Burn & Company in respect of the year 1928-29 did not escape assessment. It is, however, not necessary that we should express a definite opinion on this point in view of the conclusion we have arrived at with regard to the further point taken on behalf of the assessees in respect of the

assessment of the year 1929-30. This point relates to the interpretation to be put upon the expression 'in any year' for the purposes of Section 34. The argument put forward on behalf of the assessees is that no assessment could lawfully be made under Section 34 because the notice purporting to have been given under that section was served more than one year after the year in which the assessment should normally have been made and that, if the income of Messrs. Burn & Company escaped assessment at all it escaped assessment in the year 1928-29 and therefore proceedings under Section 34 could only have been opened before the end of the year 1929-30. The view of the Income tax authorities seems to have been this that there was an assessment of income for the year 1928-29 on the income of Messrs. Martin & Company and that that assessment must be presumed to have been valid until it was declared to be invalid and it was only held to be invalid as a result of the order of this Court dated 16th May, 1930, or by the Commissioner's order dated 4th June, 1930, and his subsequent order dated 30th March, 1931. The Commissioner seems to have been of the opinion that the earliest possible date from which the period of limitation could be held to run was the date of the order of the Commissioner of the 4th June, 1930, that assessment should be dealt with in accordance with the decision of the High Court of the 16th May, 1930. It was contended before us on behalf of the Income-tax authorities that the correct view is that the period of limitation should run from the 30th March, 1931, that is, the date on which the Commissioner cancelled the first separate assessment of Messrs. Burn & Company and directed the Income Tax Officer to make a fresh assessment of their income under Section 34. The Commissioner seems not to have appreciated that the expression 'escape assessment' is not the same thing as escape from assessment and that upon the assumption that there was at one time an assessment of the income of Messrs. Burn & Company at the proper time it would scarcely be right to say that they escaped assessment in respect of that income at a later period. Mr. Pugh has argued that the expression 'in any year' can only refer to the year in which the assessment would normally and properly be made or at any rate, initiated and as regards the year 1928-29 he has put the matter

thus :—The year 1927-28 was the earning year. The year 1928-29 was the assessment year or, as we may call it, the tax year and the year 1929-30 was the "corrective" year so that as regards the assessment for the year 1928-29 the Income-tax authorities would merely have had time up to the 31st March, 1930, within which to take proceedings under Section 34, supposing always that the income of Messrs. Burn & Company had in fact previously escaped assessment. It may perhaps not inaptly be said that in relation to the assessment year 1928-29 the year 1929-30 was, as it were, an *annus pœnitentiæ* available to the Income-tax authorities. Mr. Pugh crystallised the whole of his argument into this proposition :—If there was no escape from assessment, then Section 34 did not apply at all; if on the other hand there was an escape, then the proceedings under Section 34 were altogether too late. It was conceded by both sides that if the expression 'in any year' bears the meaning contended for by Mr. Pugh, then without doubt the notice of the 31st March, 1931, was given too late and so the Income-tax authorities would be relegated to the remedies, if any, they might still have consequent on the original assessment. Mr. Pugh in support of his argument as to the meaning of the expression 'in any year' as used in Section 34 referred to a number of the other sections of the Income Tax Act, 1922, notably Section 2, sub-section 11, Sections 3, 6, 12 and 23 and he invited us to come to the opinion that the language and tenor of those sections as well as the language of Section 34 itself indicate that in the expression 'in any year' the word year can only refer to the actual twelve months in which an assessment would normally and properly be made. It is obvious that to hold otherwise would bring it about that if an assessment had been duly made, and if for any reason the assessment was subsequently cancelled even after a considerable lapse of time, the right of the Income-tax authorities to demand a fresh return by virtue of the provisions of Section 34 might be prolonged indefinitely. Having carefully considered the matter and having given due weight to the arguments of the learned Advocate-General we think we ought to accept the contention put forward by Mr. Pugh on behalf of the assessees and hold that the expression 'in any year' must be read as meaning the year during which proceedings

in assessment in respect of that very year should have been initiated. We accordingly hold that the notice served on the assessees in this case under Section 34 was not a valid notice in that it was not served within the period of limitation allowed by the section. For the reasons already given this disposes of the case in favour of the assessees. We make no order as to costs.

Reference answered accordingly.

Solicitors—Orr, Dignam & Co., for the assessees.

[In the Privy Council.]

RHODESIA RAILWAYS LTD. *v.* RESIDENT COMMISSIONER OF BECHUANALAND PROTECTORATE AND ANOTHER.

February 21, 1933.

Lord Atkin, Lord Russell of Killowen and Lord Macmillan.

Income Tax—Bechuanaland Protectorate—Claim for Relief in Respect of Tax Paid in United Kingdom—Limitation—Difference between Claim for Refund of Tax Paid in Excess and Claim for Relief in Respect of Tax Properly Paid—' Properly Chargeable, ' meaning of—Bechuanaland Protectorate Income Tax Proclamation, 1922, Sections 17 and 51.

The Bechuanaland Protectorate Income Tax Proclamation of 1922 provided by Section 17, sub-section (1), that for the purposes of income-tax payable under the Proclamation income shall be assessable without any deduction for income-tax payable in the United Kingdom, but sub-section (2) of Section 17 provided that if a person proves that he has paid income-tax in the United Kingdom for the same year on the same income he shall be entitled to relief from income-tax under the Proclamation paid or payable by him on that part of his income at a certain rate. Section 51 provided that if it was proved that the amount paid by any person was in excess of the amount ' properly chargeable ' under

the Proclamation the Collector may authorise a refund of the tax overpaid, provided the claim was made within two years after the date when the payment was made:

Held, *that a claim for 'relief' under Section 17 (2) was not subject to the limitation of two years imposed by the proviso to Section 51. The said proviso applied only to the case where a person has paid income-tax 'in excess of the amount properly chargeable' under the Proclamation and it cannot be said that a person who pays income-tax under Section 17 (1) of the Proclamation without any deduction for United Kingdom tax makes a payment in excess of what is 'properly chargeable.'*

Though the defence of limitation is not an unrighteous defence, it is a creature of positive law and therefore not to be extended to cases which are not strictly within the enactment.

Case referred to:—

RODDAN *v.* MORLEY [1857] (26 L. J. Ch. 438; 5 W. R. 510; 1 DE. G.J. 1).

Appeal from a Judgment of the Special Court of the Bechuanaland Protectorate dated June 22, 1932.

A. M. Latter and *Cyril King*, for the appellants.

Attorney-General and *R. P. Hills*, for the respondents.

LORD MACMILLAN.—The appellants are a Railway Company which has its head office in London and owns and conducts an important railway undertaking partly situated in the Bechuanaland Protectorate. They are liable to income-tax both in the United Kingdom and in the Protectorate. For the year to June 30, 1925, the appellants were assessed to income-tax by the respondent, the Collector of Income-tax of the Protectorate, under the Bechuanaland Protectorate Income-tax Proclamation, 1922, in the sum of £ 19,896 1s., representing income-tax at the rate then chargeable on that part of the appellants' income which was earned in the Protectorate. The tax was paid in November 1925. For the following year to June 30, 1926, the appellants were similarly assessed in the sum of £ 24,883 3s. 6d., which they paid in October 1926. By Section 17 of the Proclamation it is provided that:

"(1) For the purposes of income-tax payable under this Proclamation income shall be assessable without any deduction

for income-tax (including super-tax) payable in the United Kingdom."

But provision is made for a certain measure of relief in the immediately following sub-section, which is in the following terms:

"(2) Any person who has paid by deduction or otherwise or is liable to pay income-tax under this proclamation for any year of assessment on any part of his income, and who proves to the satisfaction of the Collector of income-tax that he has paid income-tax in the United Kingdom for that year in respect of the same part of his income, shall be entitled to relief from income-tax under this proclamation paid or payable by him on that part of his income at a rate equal to the amount by which the rate of tax appropriate to his case under the proclamation exceeds half the appropriate rate of United Kingdom tax.............

For the two years in question the appellants were liable to pay income-tax in the United Kingdom on their whole income including the portion of their income earned in the Protectorate on which they paid tax under the Proclamation; but it so happened that owing to delays in settling the figures of the appellants' assessment in the United Kingdom, the amount of the United Kingdom income-tax payable by them for the years 1924-25 and 1925-26 was not finally ascertained and paid until November 1930. The appellants were thus not in a position till the end of 1930, to claim the relief provided under Section 17 (2) of the Proclamation above quoted. The amount of the relief calculated in terms of the sub-section is agreed to be £ 1,251 11s. 6d. for 1924-25 and £ 3,500 7s. 6d. for 1925-26.

On the appellants intimating their claim, duly vouched, to these reliefs they were met with the answer that it came too late and was barred by the terms of the proviso to Section 51 of the Proclamation. That section runs as follows:—

"51. If it is proved to the satisfaction of the Collector that the amount paid by any person is in excess of the amount properly chargeable under this Proclamation the Collector may authorise a refund to such person of any tax overpaid; provided, however,

that no such refund may be authorised unless the claim therefor is made within two years after the date when the payment was made."

If the proviso just quoted is applicable to the case, then, inasmuch as the claim of the appellants to a refund was not made until 1930 in respect of tax paid in 1925 and 1926, the appellants are out of Court. In consequence of the refusal of the Collector to afford the relief claimed, the appellants brought an action against the respondents in the Special Court of the Bechuanaland Protectorate for payment of the said sums of £1,251 11s. 6d. and £3,500 7s. 6d., and the parties joined issue on the sole question whether the appellants' claim was statute barred. The Court on June 22, 1932, upheld the respondents' plea in bar, and subsequently granted leave to the appellants to appeal to His Majesty in Council. To quote the appellants' declaration:

"All things have happened, all times have elapsed, and all conditions have been fulfilled"

to entitle them to the relief provided by Section 17 (2) of the Proclamation. It is for the respondents to establish with equal precision that their plea in bar is justified by the terms of Section 51. Their Lordships observe, in the first place, that under Section 17 (1) no deduction in respect of income tax payable in the United Kingdom is permitted in the assessment of income for tax purposes in the Protectorate. The income-tax payer in Bechuanaland is thus chargeable with tax on the full amount of his income without any deduction in respect of income-tax payable by him in the United Kingdom. But if he can show that he has in fact paid United Kingdom income-tax on the same income for the same year, he is to be "entitled to relief" from the income-tax paid or payable by him in the Protectorate to the extent provided in Section 17 (2). The conditions being satisfied, the Proclamation confers a right to the relief which the income-tax payer can enforce.

Now, when Section 51 is examined, it appears that it applies only to the case where a person has paid income-tax "in excess of the amount properly chargeable" under the Proclamation; in that event the Collector "may authorise a refund to such

person of any tax over-paid." It cannot be said of the appellants that when they paid their income tax in Bechuanaland for the years 1924-25 and 1925-26 without any deduction for United Kingdom tax they made payments "in excess of the amount properly chargeable" under the Proclamation, for Section 17 (1) expressly forbids any such deduction. The sums which they paid were "properly chargeable" against them under the proclamation and if they had not paid these sums they could have been compelled to do so. They are not now claiming a refund of any "tax overpaid," for they made no over-payment. What they are asking is relief by way of repayment of a part of what originally they properly paid. The language of Section 51 in providing that the Collector "may" authorise a refund in the case of any tax overpaid is inappropriate to the case of a person claiming under Section 17 (2) a legal right of relief which the Collector has no discretion to refuse. The respondents, in their Lordships' opinion, have not succeeded in showing that the terms of Section 51 fit the case of the appellants' claim, and consequently have failed to establish that the claim is subject to the limitation of two years imposed by the proviso to the section. Their Lordships may appropriately quote from the case of *Roddan* v. *Morley* the following observations of Lord Chancellor Cranworth at page 23:

"I should be very unwilling to give encouragement to the notion that there is of necessity anything morally wrong in a defendant relying on a statute of limitation. It may often be a very righteous defence. But it must be borne in mind that it is a defence, the creature of positive law and therefore not to be extended to cases which are not strictly within the enactment."

In the Court below the fact that Section 15 occurs in a group of sections under the heading "Miscellaneous" was invoked as indicating that it was intended to be of general application to all cases in which a refund of income-tax was claimed by a taxpayer, and the circumstance that Section 17 (2) provides no procedure for the enforcement of the relief which it confers, while Section 51 is the only section in the Proclamation which deals with refunds by the Collector, was also given considerable weight. The difficulty arising from the use of the

word "may" was surmounted by reading it as equivalent to "shall", where the prescribed conditions were satisfied. Their Lordships do not find in these arguments any sufficient justification for extending the language of Section 51 so as to make it fit a case to which its terms are inapposite. The Attorney-General drew attention to the fact that Section 17 (2) occurs in a part of the Proclamation which has for its heading the general title "Abatements", and, founding on the definition in Section 6, which enacts that "taxable income" shall mean the income of any person after allowance of all deductions other than abatements, and "taxable amounts" shall mean the amount remaining after deducting from any taxable income the abatements allowed, sought to make out that the words "amount properly chargeable" in Section 51 were applicable to the amount chargeable after the deduction of the relief under Section 17 (2). But this argument is sufficiently refuted by the provision in Section 17 (1) forbidding any deduction for United Kingdom income-tax in assessing income for the purposes of tax under the Bechuanaland Proclamation. It is, no doubt, true that if, as their Lordships hold, Section 51 does not apply to claims under Section 17 (2) there is no time limit imposed by the Proclamation on such claims, but this affords no justification for remedying the omission judicially, if it be an omission. Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgment of the Special Court of the Protectorate of Bechuanaland of June 22, 1932, be reversed, and the case be remitted to the Special Court to be disposed of on the footing that the respondent's plea in bar is not well-founded. The appellants will have their costs of the appeal and in the Court below.

Appeal allowed.

Solicitors—Coward, Chance & Co., for the appellants; *Gedge Fiske & Co.*, for the respondents.

[IN THE RANGOON HIGH COURT.]

SONIRAM RAMESHWAR *v.* MARY PINTO.

LEACH, J.

July 10, 1933.

INCOME TAX—FUNDS IN COURT—CLAIM BY CROWN AND OTHER CREDITORS—CROWN'S RIGHT TO PREFERENTIAL PAYMENT —POWER OF COURT TO DIRECT PAYMENT WITHOUT ATTACHMENT.

Where a receiver was appointed in a mortgage suit to collect the rents of the mortgaged property and the Commissioner of Income Tax applied to the Court for an order directing the receiver to pay to him, out of the rents collected by the receiver, a certain sum of money which was payable to the Crown by the mortgagor as income-tax :—Held, *that the Crown had a right of preference in respect of such debts as against unsecured debts, and the Court had power to direct the receiver to pay out of the rents collected, the income-tax debt due to the Crown on the application of the Commissioner without any attachment.*

Quære :—*Whether the Crown has a right of preference as against secured debts.*

Cases referred to :—

C. R. M. A. CHETTYAR FIRM *v.* AUNG BAN ZAYA RICE MILL CO., LTD. [FIRST APPEAL No. 74 of 1928].

GANPAT PUTAYA *v.* COLLECTOR OF KANARA [1875] (1 Bom. 7).

GAYANODA BALA DASSEE *v.* BUTTO KRISTO [1906] (33 Cal. 1040; 10 C.W.N. 857).

GULZARI LAL *v.* COLLECTOR OF BAREILLY [1878] (1 ALL. 596).

RAMDAS *v.* SECRETARY OF STATE [1896] (18 ALL. 419; [1896] A. W. N. 121).

REX *v.* CURTIS (145 E. R. 724).

SECRETARY OF STATE *v.* BOMBAY LANDING AND SHIPPING CO., LTD. [1868] (5 Bom. H. C. O. C. 23).

A. Eggar, for the Crown.

Masani, for the plaintiff.

Robertson, for the defendant,

LEACH, J.—This suit was filed on 11th October, 1932, to recover a sum of Rs. 16,918-10-0 due on a mortgage. A receiver was subsequently appointed to take charge of the mortgaged premises and to collect the rents therefrom. The defendant is indebted to the Crown to the extent of Rs. 29-5-0 due under the Income Tax Act. As the result of the collection of rents of the mortgaged premises the receiver has in hand moneys sufficient to pay the amount of income-tax due by the defendant. In these circumstances the Commissioner of Income Tax has applied for an order directing the receiver to pay to him this sum of Rs. 29-5-0. The Commissioner of Income Tax claims that the Crown is entitled to a first charge on the rents which the receiver has collected. Mr. Masani for the plaintiff and Mr. Robertson for the defendant have no objection to the application being granted, but the learned Government Advocate asks for a ruling on the question of the Crown's right to priority and also for a ruling on the further question whether the Court can order payment on an application of the nature of the one before me. The Crown has by Common Law a right to priority. In *Rex* v. *Curtis*, Parke, C. B., said:

"By the Common Law the King has a prerogative of preference in payment to all his subjects, and to be first satisfied; the reason of it is given in *Sir William Herbert's* case, *Quia thesaurus Regis est pacis vinculum et bellorum nervi.*

This preference which the King had by the Common Law, was the foundation of Magna Charta, c. 18, which was only declaratory of the Common Law."

The right to priority has received recognition in India, as far as unsecured creditors are concerned. The leading case in India is *Secretary of State* v. *Bombay Landing and Shipping Co., Ltd.*, where, after an exhaustive examination of the authorities by WESTROPP, J., the Court held that a judgment debt due to the Crown was entitled to the same precedence in execution as a like judgment debt in England, if there was no special legislative provision affecting that right in the particular case. It was pointed out that whatever rights the Crown had to any portion of the Indian revenue before 1858 it still had and that Section 2 of the Statute of that year, 21 and 22 Vic., c. 106, vested in the Crown all the

territorial and other revenues of or arising in India, and directed that all of those revenues should be received not only for but in the name of Her Majesty. It may be observed that Section 131, Government of India Act, provides that nothing in the Act shall derogate from any right vested in His Majesty or any of the powers of the Secretary of State in relation to the Government of India.

In the case of *Ganpat Putaya* v. *Collector of Kanara*, it was held that the Crown had the first claim to the proceeds of a pauper suit to the extent of the amount of the Court-fee that would have been payable at the institution of the suit had the plaintiff not been a pauper. Section 309, Civil Procedure Code, 1859, (which provided that in a pauper suit the Court-fees should be recoverable by Government from any party ordered by the decree to pay the same in the same manner as the costs of a suit were recoverable) did not preclude the Crown or its representative from urging its prerogative. The plaintiff in that case obtained a decree against one Jivaji and in execution caused the debt due by one Meghji to Jivaji to be attached by prohibitory order. This attachment was placed when Jivaji's suit against Meghji (which was brought in *forma pauperis*) was pending. At the conclusion of the pauper suit, in which Meghji was directed to pay to Jivaji Rs. 900, the Collector intervened and applied to have a sum of Rs. 70-2-2 paid to him, that being the amount which Jivaji would have had to pay as Court-fees if he had not been allowed to sue as a pauper. The Collector's application having been granted and this sum paid to him, the plaintiff, Ganpat, brought this suit to recover the money, alleging that his attachment was prior to the Collector's and that he had therefore a right to prior satisfaction. The plaintiff contended that Section 309 of the Code of 1859 expressly enacted that the value of the Court-fees was to be recovered in the same manner as costs would be recovered in ordinary cases. No precedence was given to the Crown which was therefore in the same position as any other judgment-creditor. This argument was rejected. West, J., in delivering the judgment of the Court said:

"The decision of this case turns upon the construction of Section 309, Civil Procedure Code. Its direction that the amount of fees, which would have been paid by the pauper plaintiff shall

on decision of the suit, be recoverable by Government from any party ordered by the decree to pay the same in the same manner as costs of suit are recoverable, does not preclude the Crown or its representative from urging its prerogative and insisting upon its right to precedence. The circumstance of its being placed in the position of a judgment-creditor does not reduce its right of necessity to those of a private judgment-creditor in case of a contest as to prior satisfaction out of moneys realized in execution. It is a universal rule that the prerogative and the advantages it affords cannot be taken away except by the consent of the Crown embodied in a Statute. This rule of interpretation is well established, and applies not only to the Statutes passed by the British, but also to the Acts of the Indian Legislature framed with constant reference to the rules recognized in England.

The Court therefore approved of the Collector being paid the money due to the Crown on mere application. This case was followed by the Allahabad High Court in *Gulzari Lal* v. *Collector of Bareilly*. In *Ramdas* v. *Secretary of State* the same Court held in a suit brought in *forma pauperis* in which the plaintiff was successful, that it was not necessary for the Government to bring a separate suit to recover the Court-fee, but that the same might be realized from the property the subject of the suit by proceedings in execution. Here the decree directed that the Court-fee should be a first charge on the property, and should be recoverable from the defendant in the same manner as costs of the suit.

The latest reported decision to which my attention has been drawn is the case of *Gayanoda Bala Dassee* v. *Butto Kristo*. The plaintiff obtained a decree in a suit filed in *forma pauperis*. The decree directed that the property in suit should be conveyed to the plaintiff. The taxing officer was required to certify the amount of Court-fees that would have been payable by the plaintiff, had she not sued in *forma pauperis*, and to tax the plaintiff's other costs of suit. The decree further required the defendants to pay the amount of Court-fees to be certified by the Government Solicitor, and directed that these should form a first charge on the property conveyed. Subsequently, the plaintiff attached other premises belonging to the defendants and obtained an order for sale. The sale-proceeds were paid into

Court in accordance with the Court's order. The plaintiff's attorney without notice to the Government Solicitor or the defendants made an application for payment to him of the amounts realized in execution from the defendants. Thereupon the Government Solicitor presented a petition asking that the amount of Court-fees certified as due and payable by the defendants to the Government Solicitor in terms of the decree be paid in the first instance and in precedence to all claims. It was held that the Court-fees formed a Crown debt and under ordinary circumstances the principle would apply that the Crown would be entitled to precedence in payment of this debt over all creditors. In this case it was contended that the Crown in order to recover Court-fees must proceed to enforce the charge on the subject-matter of the suit, and that as regards other properties of the judgment-debtor the Crown had only the right of a private judgment-creditor and could only proceed to realize its claim in the usual method by attachment and sale. SALE, J., before whom the case came, refused to accept this argument and held that inasmuch as the Crown represented by the Government Solicitor was entitled to precedence over all creditors no necessity existed for attachment of the fund before claiming payment. Section 411, Civil Procedure Code, 1877, (which corresponds to Order XXXIII, Rule 10 of the present Code) was an enabling section, and though it indicated the manner in which the Crown might proceed to realize the debt it did not prejudice the Crown or its representative from urging its prerogative and insisting on its right to precedence over all creditors. With this view I respectfully agree.

In the unreported case of *C.R.M.A. Chettyar Firm* v. *Aung Ban Zaya Rice Mill Co., Ltd.*, a Bench of this Court held that the receiver in a mortgage suit had been rightly directed to pay out of moneys representing rents (not the subject of mortgage) the amount due to the Crown by way of income-tax before paying the mortgagee the amount due under his personal decree. In this case an attachment had been issued by the Collector, Prome, to the Judge of the District Court of Prome, and had been sent by him to the bailiff as receiver for necessary action.

It is not necessary for me to consider the question whether the Crown has a right to preference in payment as against a

secured creditor as it does not arise on the present application. With regard to unsecured creditors I hold that the Secretary of State for India in Council representing the Crown is entitled to priority in payment, and that where there are funds in Court out of which payment can be made the Court can order payment without prior attachment. Of course, notice of any such application must be given to interested parties. In this case the advocates of the interested parties have appeared, and do not dispute that the amount claimed is due to the Crown. The application is accordingly granted.

Application granted.

[IN THE PRIVY COUNCIL.]

BHARAT INSURANCE CO., LTD.

v.

COMMISSIONER OF INCOME-TAX, PUNJAB.

LORD MACMILLAN, SIR JOHN WALLIS AND SIR GEORGE LOWNDES.

December 15, 1933.

INCOME TAX—INSURANCE COMPANY—PROFITS ALLOTTED TO PARTICIPATING POLICY HOLDERS—WHETHER PROFITS OR BUSINESS EXPENDITURE—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 3, 10 (2) (ix)—INCOME TAX RULES, RULE 25.

Where the participating policy holders in an Insurance Company were entitled under their contract to a certain share of the profits made in the participating branch of the business and the company claimed that in assessing the income of the company for purposes of income-tax the sums of money allotted for distribution to the participating policy holders should be deducted : Held, *that the sums so allotted to the participating policy holders was part of the profits of the Company and not expenditure incurred by the Company for earning profits within the meaning of Section 10 (2) (ix) of the Indian Income-tax Act, and the Company were therefore liable to be assessed to income-tax in respect of the share of the profits allotted to the participating policy holders.*

Profits on their coming into existence attract income-tax at that point and the revenue is not concerned with the subsequent application of the profits.

Cases referred to:

COLTNESS IRON CO. v. BLACK [1881] (6 A.C. 315; 51 L.J. Q.B. 626; 45 L.T. 145).

GRESHAM LIFE ASSURANCE SOCIETY v. STYLES [1892] (16 A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479).

LAST v. LONDON ASSURANCE CORPORATION [1886] (10 A.C. 438; 55 L.J.Q.B. 92; 53 L.T. 634).

MERSEY DOCKS AND HARBOUR BOARD v. LUCAS [1883] (8 A.C. 891; 53 L.J.Q.B. 4; 49 L.T. 781).

NEW YORK LIFE INSURANCE CO. v. STYLES [1889] (14 A.C. 381; 59 L.J.Q.B. 291; 61 L.T. 201).

PONDICHERRY RAILWAY CO. v. INCOME-TAX, COMMISSIONER [1931] (58 I.A. 239; 1931 Comp. Cas. 314; 54 M. 691; 132 I.C. 619).

Appeal from a judgment of the Lahore High Court dated February 27, 1931 [P.C. Appeal No. 67 of 1932]. The judgment of the High Court is reported in 1931 Comp. Cas. 192; 132 I.C. 861; A.I.R. (1931) Lah. 739.

L. DeGruyther and *W. Wallach*, for the appellants.

A. M. Dunne and *R. P. Hills*, for the respondent.

SIR JOHN WALLIS.—This is an appeal from a judgment of the High Court of Judicature at Lahore on a reference made by the Commissioner of Income-tax, Lahore, under Section 66 (2) of the Income-tax Act, 1922, on the question whether the appellant, the Bharat Insurance Company, was liable to be assessed under that Act to income-tax in respect of the profits allotted to participating policy holders who were entitled under their contract to 90 per cent. of the profits made in the participating branch of the business.

The Bharat Insurance Company was incorporated under the Indian Companies Act in 1882, for the purpose of making and effecting assurances on lives and carrying on other insurance business. Under the provisions of Sections 5 and 6 of the Indian Life Assurance Companies Act, 1912, the company's life assurance business has to be kept entirely separate from its other business, if any, and under Section 8 (1) it is obliged to have a quinquennial valuation made by an actuary and to cause an abstract of the report of such actuary to be made in the form set forth in Schedule 4 to

the Act. The form of the resulting valuation balance sheet is to be found at the end of Schedule 4 of the Act and is as follows:

VALUATION BALANCE SHEET OF AS AT 19 .

Dr.	Rs.	*Cr.*	Rs.
To net liability under life assurance and annuity transactions (as per summary statement provided in Sch. 4)		By life assurance and annuity funds (as per balance sheet under Sch. 3)	
To surplus, if any		By deficiency, if any	

The actuarial valuation balance sheet as at 31st December, 1923, for the previous quinquennium was drawn up in exactly this form and showed a surplus of Rs. 5,96,952, out of which Rs. 4,68,394 was allotted to the participating policy holders. Under rule 25 made under Section 59 of the Indian Income-tax Act, 1922 "the income, profits and gains of a life assurance business shall be the average annual net profits disclosed by the last preceding valuation,"

that is to say, shall be arrived at by taking one-fifth of the surplus disclosed in the valuation balance sheet already mentioned and treating it as the average annual income of the business for the next quinquennium. The surplus shown in the valuation balance sheet was so dealt with, and was raised to Rs. 6,61,935 by adding back, pursuant to the proviso to rule 25, deductions made by the actuary which were inadmissible for income-tax. One fifth of this total was taken as the average annual income of the Company for the next quinquennium; and the Company was assessed and paid income-tax on this sum in the year 1925-26 and the following years down to and inclusive of 1928-29. For 1929-30, the year now in question, the company also returned this sum as the amount of its income under Section 22 (1) of the Act, and was assessed accordingly under Section 23 (1).

From this assessment they appealed to the Assistant Commissioner under Section 30, and raised the contention, which is the subject of the present appeal, that in working out of its average annual income the sum of Rs. 4,68,394 paid to participating policy holders should have been deducted before

arriving at the surplus already mentioned. The Assistant Commissioner dismissed the appeal, and the Company thereupon applied to the Commissioner to review the case under Section 33, and, in the alternative, to refer the question of law to the High Court under Section 66 (2) of the Act. The Commissioner refused to interfere in review, but referred the following question to the High Court:

"Whether the sum of Rs. 4,68,394 distributed among participating policy holders represents part of the profits assessable to income-tax, or an expenditure incurred for earning the profits of the Company."

As required by the Act, the Commissioner recorded his opinion that the first part of the question should be answered in the affirmative and the latter in the negative, in accordance with the decision of the House of Lords in *Last* v. *London Assurance Corporation* which, he stated had been re-affirmed in *New York Life Insurance Company* v. *Styles*.

The learned Judges, in a carefully considered judgment, agreed with the Commissioner that the sum in question was part of the profits of the company and so assessable to income-tax, and did not come under the description of expenditure incurred by the company. In support of this opinion they referred to the decisions of the House of Lords in *Mersey Docks and Harbour Board* v. *Lucas* and *Last* v. *London Assurance Corporation*. In the first of these cases it had been held that the liability of the Mersey Docks and Harbour Board to be assessed to income-tax in respect of the profits earned by it in carrying on its business, that is to say, the sum by which the income earned in the business exceeded the expenditure incurred in earning it, was not affected by the fact that the Board was bound by statute to apply such surplus for the creation of a sinking fund and afterwards in reduction of its dues. In *Last's* case it was held that the liability of the London Assurance Corporation to pay income-tax on the whole of the profits earned in its business was not affected by the fact that it had bound itself by its contract with the participating policy holders to pay them two-thirds of the profits earned in the participating part of its business, and it was accordingly held that this share was part of the

profits earned by the company in carrying on its business and so assessable to income-tax, and could not be regarded as expenditure incurred by the Corporation in earning its own profits.

In England the income-tax payable on a trade or business has "to be computed on the full balance of the profits or gains," phraseology which, as pointed out by Lord Blackburn in *Coltness Iron Co.* v. *Black* has remained unaltered since its insertion in 46 Geo. III c. 15. This balance or sum has always been interpreted as meaning the difference between the income earned in the business and the expenditure incurred in earning it. Section 10, Income-tax Act, 1922, is substantially to the same effect, as it provides that under the head "business" the tax is to be payable "in respect of the profits or gains of any business," and that "such profits or gains shall be computed after making the following allowances, namely :—

. . . (ix) Any expenditure (not being capital expenditure) incurred solely for the purpose of earning such profits or gains."

Prima facie, therefore, *Last's* case is decisive of the present case, as it directly decides the question referred for the opinion of the Court. Relying however, on the fact that this question had given rise to differences of opinion in the Queen's Bench Division and the Court of Appeal, and that in the House of Lords Lord Bramwell dissented from the opinions of Lord Blackburn and Lord Fitzgerald, Mr. de Gruyther, for the appellant, has argued that this case was wrongly decided and has invited the Board not to follow it, but to decide the other way. This suggestion their Lordships are wholly unable to accept. *Last's* case has now been treated as settled law for nearly 50 years, not only here, but also, presumably, in the Dominions and Colonies, and very serious consequences might follow if this Board were now to lay down a different rule.

It is however necessary to refer to the grounds of Lord Blackburn's judgment with reference to the objection taken here and before the High Court that it was based on the provisions of Section 54, 5 and 6 Vict. c. 35, the Act of 1842 which has no equivalent in India. Lord Blackburn's judgment was really

based on his view as to the nature of the bargain between the parties and would have been to the same effect if there had been no such statutory provision. In his view, stating it briefly, what the company got in the shape of extra payments made by participating policy holders was an addition to its premium income which was almost all pure profit, as the extra expenditure involved was small and the company incurred no liability whatever in respect of the extra payments by the participating policy-holders unless there was a profit. This accounted for the large share of the profit offered to the participating policy holders. On the other hand, all the participating policy holders got was a share of any profit there might be, and, if there was no profit, they got nothing. They might therefore, Lord Blackburn said, be regarded as having purchased a share of the profits. If that was the right view, income-tax was payable by the corporation on those profits, whatever they might be bound to do with them, as held in the *Mersey Docks* case. This, he proceeded to say, seemed to be expressly enacted by 5 & 6 Vict. c. 35, Section 54, which requires the estimate of the profits of a corporation to be made:

"before any dividend shall have been made thereof to any other persons having any share; right or title in or to such profits."

Lord Blackburn and Cotton, L.J., in the Court of Appeal, were both of opinion that if the participating policy holders were to be considered as having a share of the profits of the Corporation within the meaning of this section, that would go to show that the share of the profits allotted to them formed part of the profits assessable to income-tax; but Cotton, L.J., had held that they were not within the section, whereas Lord Blackburn was of opinion that they were. In their Lordships' opinion, it is unnecessary to pursue this question, as it is clear that Lord Blackburn would have been of the same opinion if there had been no such section, and this section was not referred to either by Lord Fitzgerald or by Lindley, L.J., as he then was, in his short dissenting judgment in the Court of Appeal, on which Mr. Hills, in his argument for the respondent has invited the Board to base their decision in this case. In that judgment Lindley, L.J., summed up the whole question in three sentences,

which their Lordships will proceed to quote, merely premising that "bonus" was the inappropriate name given by the insurance company to the share of profits which the participating policy holders were entitled to receive under their contracts in consideration of the additional payments they had made.

" These bonusos arc not like the expenses of management or anything that must be necessarily incurred for the purpose of carrying on the business. I cannot see how the fund for division can be spent in earning itself. In my view the fund which is divided partly among the shareholders and partly among the policy holders is the cxcess of the carnings over the expenses incurred in earning that excess."

In *Gresham Life Assurance Society* v. *Styles* the grounds on which that case was decided were the same as in *Last's* case though the result was different as the claim of the income tax authorities to treat as profits the payments made to the company in consideration for the grant of annuities was disallowed by the House of Lords, as they went to form part of its life assurance and annuity funds. Lastly, their Lordships will refer to the decision of this Board in *Pondicherry Railway Company* v. *Income Tax Commissioner* which was decided subsequent to the date of the judgment under appeal. The main question in that case was whether the appellant, a British Company which had been licensed to construct and operate a railway in French territory from the pier-head at Pondicherry to a junction with the South Indian Railway at the British frontier, was liable to be assessed to Indian Income tax; but it was also contended that, even if the company was liable to be assessed, they were entitled under Section 10, sub-section 2, clause (ix), to deduct as expenditure incurred solely for the purpose of earning their profits, the half-share of their profits which they were bound by their convention with the French Government to pay to the French Colony, and the two cases last mentioned were cited at the Bar. This contention was rejected by the Board in a judgment delivered by Lord Macmillan on much the same grounds as had been taken in *Last's* case.

It is claimed for the company that when it makes over to the Colonial Government their half of the net profits it is making an expenditure incurred solely for the purpose of earning

its own profits. The Court below has unanimously negatived this contention, and, in their Lordships' opinion, has rightly done so. A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point, and the revenue is not concerned with the subsequent application of the profits."

If *Last's* case had never been decided, this decision would, in their Lordships' opinion, be decisive of the present case, as the share of profits allotted to the policy holders really stands on the same footing as the half of the profits of the Railway Company payable to the French Colony. It was further contended for the appellants that in England the decision in *Last's* case must be considered to have been overruled by the legislature, as under the provisions of Section 16, Finance Act, 1923, 13 and 14 Geo. 5, c. 14, the share of profits allotted to participating policy holders is exempted from payment of income tax. As to this contention, it is sufficient for their Lordships to say that an alteration by the legislature of the law as settled by the decisions of the Courts does not raise any inference that those decisions were wrong or even that those who had proposed the alteration were of that opinion. The last contention was that the participating policy holders' share of profits is not assessable because, as already stated, rule 25 of the Income Tax Rules provides that

"the income, profits and gains of life assurance business shall be the average annual net profits disclosed by the last preceding valuation."

The contention, however, is negatived by the proviso that any deductions made from the gross income in arriving at the actuarial valuation which are not admissible for the purposes of income-tax assessment shall be added to the net profits disclosed by the valuation. The "net profits" in this rule clearly mean the "surplus, if any" in the statutory form of Valuation Balance Sheet set out above, of "life assurance and annuity funds (as per balance sheet under Schedule 3)" over the "net liability under life assurance and annuity transactions (as per summary statement provided in Schedule 4)." In the present case, as already stated, the Rs. 4,68,394 allotted to participating policy holders

was taken from the surplus or net profits shown in the Valuation Balance Sheet, but, if they had been deducted before arriving at such surplus, they would have to be added under rule 25 to such surplus shown therein "as deductions not admissible for income tax assessment," not being expenditure incurred solely for the purpose of earning such profits, within the meaning of Section 10, sub-section 2, clause (ix), of the Act. Their Lordships are therefore of opinion that the learned Judges were right in following *Last's* case and that the appeal fails, and they will humbly advise His Majesty accordingly. The appellant company will pay the respondent's costs.

Appeal dismissed.

Solicitors.—Hy. S. L. Polak & Co., for the appellants; *The Solicitor, India Office*, for the respondents.

[IN THE PRIVY COUNCIL.]

SIR RAJENDRANATH MUKERJEE

v.

COMMISSIONER OF INCOME TAX, BENGAL.

Lord Macmillan, Sir John Wallis, Sir George Lowndes.

December 7, 1933

INCOME TAX—ASSESSMENT AFTER EXPIRY OF TAX YEAR—VALIDITY—INCOME RETURNED BUT NOT ASSESSED WITHIN TAX YEAR—FRESH NOTICE UNDER SECTION 34, WHETHER NECESSARY—'ESCAPE ASSESSMENT", MEANING OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 34.

In April 1927, notice was issued to Burn & Company calling for a return of their income for the year 1926-27 and a return was duly made in 1928. Meanwhile the income-tax authorities thought that Martin & Company had purchased Burn & Company, and made an assessment on Martin & Company in respect of the joint income of Burn & Company and Martin & Company. Martin & Company appealed and the High Court ultimately held on May 16, 1930, that the two companies should have been separately

assessed. The assessment of Martin & Company was accordingly amended by eliminating the income of Burn & Company and the Income Tax Officer assessed Burn & Company on November 8, 1930, on their income as returned in 1928.

Held, *that the income of Burn & Company did not 'escape assessment' within the meaning of Section 34 of the Income Tax Act, and consequently the serving of a notice under that section before the expiry of the year 1928-29 was not an essential pre-requisite of a valid assessment of that income, and as there was no other time limit prescribed or necessarily implied in the Act, the assessment of November 8, 1930, was not out of time.*

Although the language of the Indian Income Tax Act is naturally suited to the normal case of taxation carried through all its processes within the compass of the tax year, there is no provision in the Act, express or implied, prohibiting the making of an assessment after the expiry of the tax year. Section 34 of the Act only means that in the two cases to which the section applies if no notice is served within the year following the tax year, no subsequent assessment or re-assessment can be made of the income which has escaped assessment or been assessed too low.

Income which has been duly returned for assessment cannot be said to have escaped assessment within Section 34 though it has not been taxed within the assessment year. The words 'has escaped assessment' in Section 34 cannot be read as equivalent to 'has not been assessed', and the word 'assessment' is not confined to the definite act of making an order of assessment.

LACHIRAM BASANTLAL *v.* COMMISSIONER OF INCOME TAX, BENGAL [1930] (I.L.R. 58 Cal. 909; 35 C.W.N. 310; A.I.R. 1931 Cal. 545; 133 I.C. 187; 4 I.T.C. 114) *approved.*

Appeal from a judgment of the Calcutta High Court dated February 18, 1932, upon a reference made by the Commissioner of Income Tax, Bengal, under Section 66 of the Indian Income Tax Act. [Appeal No. 15 of 1932]. The facts are stated in the judgment.

A. M. Latter, K. C. and *H. C. Marks*, for the appellants.

Dunne, K. C. and *Reginald Hills*, for the respondent.

Their Lordships' judgment was delivered by

LORD MACMILLAN.—On the 8th November, 1930, the Income Tax Officer for District V, Calcutta, made an assessment order on Burn & Company, an unregistered firm carrying on business in Calcutta, assessing them to income-tax and super-tax for the year 1927-28, under Section 23 (1) of the Indian Income Tax Act, 1922. The main question in the present appeal, in which the individual partners of Burn & Company are the appellants, is whether it was competent to make this assessment on the firm after the expiry on the 31st March, 1928, of the year in respect of which the assessment was made.

The explanation of the delay in making the assessment is as follows. It appears that towards the end of the year 1926-27 the partners of the registered firm of Martin & Company, which also carried on business in Calcutta, purchased the business and assets of Burn & Company. The purchase was effected not by or on behalf of the firm of Martin & Company, but by the partners of that firm as individuals who contributed funds for the purpose proportionally to their shares in Martin & Company and became partners in Burn & Company with the same shares therein as they held in Martin & Company. In the year 1927-28 Martin & Company was a registered firm while Burn & Company was unregistered. Under the Income Tax Act registered and unregistered firms are differently taxed in various important respects.

On the 7th April, 1927, the Income Tax Officer of District I issued a notice to Burn & Company under Section 22 (2) calling for a return of their total income for the year to the 31st March, 1927, with a view to assessing them for the year 1927-28. A similar notice was issued to Martin & Company on the 8th April, 1927, by the Income Tax Officer of District II. When they issued these separate notices the Income Tax Officers were unaware that the business of Burn & Company had been bought by the partners of Martin & Company. On the 24th September, 1927, Martin & Company made a return of their total income in compliance with the notice issued to them in April, and on the 13th January, 1928, Burn & Company made their return. Meantime the purchase of the business of Burn & Company by

the partners of Martin & Company having come to the knowledge of the income-tax authorities, Burn & Company's file was transferred to the Officer dealing with District II, and on the 25th February, 1928, he made an assessment on Martin & Company in respect of the combined incomes returned by Martin & Company and Burn & Company on the footing that the business of Burn & Company had become a branch of the business of Martin & Company.

Martin & Company appealed against this assessment, and after sundry procedure, which need not be detailed, the High Court, on the 16th May, 1930, held that the income of a registered firm cannot for the purposes of the Act be aggregated with the income of an unregistered firm, but that the income of each must be separately assessed, irrespective of the fact that the persons interested in the profits of both concerns are the same. Before pronouncing this decision, the High Court had, by a reference back to the Commissioner, ascertained that the business of Burn & Company had been bought, not with any funds belonging to Martin & Co., but with other funds belonging to the individuals who were the partners in Martin & Company, and that the intention of the purchasers was to embark on a separate venture unconnected with Martin & Company.

In consequence of this decision the assessment which had been made on Martin & Company was amended by the elimination therefrom of the income returned by Burn & Company, and on the 8th November, 1930, an assessment, being the assessment under appeal, was made on Burn & Company on their income as returned by them on the 13th January, 1928. The partners of Burn & Company appealed against this assessment to the Assistant Commissioner, by whom it was confirmed. They then, under Section 66 (2), required the Commissioner to refer certain questions of law to the High Court. The questions as framed by the Commissioner and referred by him, were as follows:—

"1. Whether the assessment made under Section 23 (1) on the petitioners on 8th November, 1930, for the year 1927-28 in pursuance of the notice under Section 22 (2), issued on them on 7th April, 1927, was a legal assessment?

2. Whether proceedings can now lie against Messrs. Burn & Company in view of the fact that final and conclusive assessments have now been made on Messrs. Martin & Company and on their individual partners?

3. Upon a true construction of the Indian Income-tax Act must not any assessment be completed within the year of assessment or in the event of such assessment not being so completed, is not the only remedy open to the income-tax authorities to proceed under Section 34 ?"

The High Court answered the first and second questions in the affirmative and the third question in the negative whereupon the present appeal was taken.

The argument of the appellants was that on a sound construction of the provisions of the Income-tax Act it is incompetent to make any assessment to tax after the expiry of the year for which the tax is charged except in the cases provided for in Section 34. That section played so important a part in the debate that it may be well to quote it in full :—

"34. If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year, or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or in the case of a company on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that the tax shall be charged at the rates at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be."

The appellants were not able to point to any express provision of the Act limiting the time within which an assessment must be made. In particular, Section 23, under which the assessment in question purports to have been made, contains no such limitation. They relied, however, on inferences which they sought to draw from other sections of the Act, and especially from

Section 34. The language of the Act is no doubt naturally suited to the normal case of taxation carried through all its processes within the compass of the tax year, but their Lordships do not find in any of the sections to which they were referred, apart from Section 34, any provisions which would justify the importation into the Act of an implied prohibition against the making of an assessment after the expiry of the tax year. Nor does Section 34, when it is examined, support the appellants' contention. That section applies to two cases, *viz.*, (1) the case where income has escaped assessment in any year, and (2) the case where income has been assessed at too low a rate in any year. In either of these cases a notice calling for a return may be issued and an assessment or re-assessment may be made of such income as has escaped assessment or has been assessed at too low a rate in the tax year, but such notice may be served only within one year after the expiry of the tax year. The inferences which the appellants asked their Lordships to draw from those provisions were: (1) that it is only in the cases to which Section 34 applies that an assessment can be made after the expiry of the tax year, and (2) that if a case does fall within either of the cases to which Section 34 applies, no assessment can be made after the expiry of the tax year unless it is made within the year following the tax year, or at least unless a notice calling for a return is made within the year following the tax year.

It will be observed under Section 34, if a notice is served within one year after the expiry of the tax year, the subsequent assessment or re-assessment may apparently be made at any time after service of the notice and not necessarily within the year following the tax year. It would be odd if in this case the assessment could be made more than a year after the expiry of the tax year, while in the normal case, where a return is made within the year, the assessment could not be made a day after the expiry of the tax year. Their Lordships do not accept the inference sought to be drawn from Section 34, that it is only where income has escaped assessment in the tax year, or has been assessed too low in that year, that an assessment may be made after the expiry of the tax year. It may be that in the two cases to which the section applies if no notice is served within the year following the tax year, no subsequent assessment

or re-assessment can be made of the income which has escaped assessment or been assessed too low, but that is not to say that in no other case can an assessment be made after the expiry of the tax year.

The appellants, however, submit that this is a case of income escaping assessment within the meaning of Section 34. Assessment, they argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year then that income, they submit, has escaped assessment within that year, and can be subsequently assessed only under Section 34 with its time limitation. This involves reading the expression " has escaped assessment " as equivalent to " has not been assessed. " Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word "assessment" and too wide a meaning to the word " escaped. " That the word " assessment " is not confined in the statute to the definite act of making an order of assessment appears from Section 66 which refers to " the course of any assessment. " To say that the income of Burn & Company which in January, 1928, was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin & Company has " escaped " assessment in 1927-28 seems to their Lordships an inadmissible reading. The fact that Section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have " escaped " assessment within the statutory meaning. Their Lordships find themselves in agreement with the view expressed in *Lachhiram Basantlal* v. *Commissioner of Income Tax, Bengal*, by the learned Chief Justice (Rankin) at page 118 : " Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessees' income which have not yet terminated in a final assessment thereof. It may be that if no notice calling for a return under Section 22 is issued within the tax year then Section 34 provides the only means available to the Crown of remedying the omission, but that is a different matter.

Their Lordships find it sufficient for the disposal of the appeal to hold, as they do, that the income of Burn & Company

did not "escape assessment" in the year 1927-28 within the meaning of Section 34 and that consequently the serving of a notice within the year 1928-29 was not an essential prerequisite of a valid assessment of that income. As there is no other time limit prescribed, or necessarily implied, in the Act, the assessment of 8th November, 1930, was therefore not out of time, and the first question was correctly answered by the High Court in the affirmative and the third question in the negative.

The appellants had another argument against the validity of the assessment. Their Lordships share the difficulty experienced by the learned Chief Justice in appreciating it. It was directed to the second question stated by the Commissioner and appears to turn on the fact that after the judgment of the High Court on Martin & Company's appeal final and conclusive assessments were made on Martin & Company and the individuals composing that partnership without including the income of those individuals as partners of Burn & Company. Their income as partners of Burn & Company then, it is suggested, "escaped assessment" because, as expressed in the sixth and seventh reasons appended to the appellants' case, the partners of Burn & Company were (in the absence of an assessment on the firm) liable to be assessed individually on their shares of the firm's profits and while they were so liable they were finally assessed (as partners of Martin & Company) without any of their shares in the profits of Burn & Company being included. In their Lordships' opinion the amendment of Martin & Company's assessment by the elimination of Burn & Company's profits with a view to the separate assessment of the latter cannot in any proper sense be described as an escape from assessment of the income of Burn & Company or of the firm's partners. The second question was therefore rightly answered in the affirmative by the High Court.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the respondent's costs.

Appeal dismissed.

Solicitors—Theodore Goddard & Co., for the appellants; *Solicitor, India Office*, for the respondent.

[IN THE ALLAHABAD HIGH COURT.]

COMMISSIONER OF INCOME TAX, UNITED PROVINCES *v.* OFFICIAL LIQUIDATOR OF THE AGRA SPINNING AND WEAVING MILLS CO., LTD.

Mukerji and Young, JJ.

November 24, 1933.

INCOME TAX—COMPANY IN LIQUIDATION—LIABILITY OF OFFICIAL LIQUIDATOR TO MAKE RETURN—'MANAGER', MEANING OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 2 (12).

A company in liquidation is a 'company' within the meaning of Section 3 of the Indian Income Tax Act and the income-tax authorities are entitled to call upon the liquidator of a company which is being wound up, to make a return in accordance with Section 22 (1) of the Act.

The word 'manager' in Section 2 (12) of the Act is wide enough to include liquidators of a company.

Case referred to:

WEST LAIKDIH COAL CO., LTD., *In re* [1926] (I.L.R. 53 Cal. 328; 96 I. C. 37; A.I.R. 1926 Cal. 781).

Civil Miscellaneous Case No. 404 of 1931. The facts are stated in the judgment.

K. Verma, for the applicant.

K. N. Katju, *Bhagwati Shankar* and *S. N. Gupta*, for the opposite party.

MUKERJI, J.—This Bench was constituted in order to decide four points, which are enumerated in the order of one of us dated 8th September, 1933. Point 4 alone has been argued because it has been found that the other three points do not arise at the present moment. If point 4 be answered in the negative, the liquidators will have to make a "return," and it is at the time of making the return that questions 1 to 3 would

arise. The official liquidators if there be any difficulty, will be at liberty to approach the Hon'ble the Company Judge and obtain direction. When a return has been furnished, it will be for the Income Tax Officer to scrutinize it and to object to any item, if there be one to take exception to. We therefore proceed to decide point 4 on which alone we have been addressed by learned Counsel for the official liquidators and the legal adviser to the income-tax authorities. The point for decision is :

"Whether under the Companies Act a liquidator is exempt from making an income-tax return on business managed by him for the beneficial winding-up of the company ?"

Just a few facts would be necessary to be stated in order to lead up to the questions before us. It appears that there was a limited company doing business in Agra, called the Agra Spinning and Weaving Mills Company, Limited. At the instance of one of the creditors a compulsory winding-up was ordered on 24th June, 1931. Two gentlemen, being advocates of this Court, were appointed official liquidators. Later on it was reported by the official liquidators to the Company Judge that "in the interest of the Company it is necessary that the business of the Company should be carried on; so permission may be granted to that effect with powers to the official liquidators to dismiss, employ and maintain such staff for the mills as they may consider proper."

This report was approved by the learned Company Judge. It appears that since this order was passed on 27th June, 1931, the business of the company as it was carried on before the liquidation, is being carried on under the direction and supervision of the official liquidators. The Income Tax Officer at Agra called on the official liquidators to make a return under Section 22 (1), Income Tax Act. There was a large amount of correspondence, and ultimately the official liquidators thought that they were not liable to make any return at all because the company had gone into liquidation. The Income Tax Officer wanted a ruling of the Court on this point, and that is how the point is now before us.

We have heard learned arguments on both sides, and we proceed to record our opinion. Under Section 3, Income Tax

Act, 1922, every individual, Hindu undivided family, "company," firm and other association of individuals are liable to income-tax. The argument on behalf of the official liquidators is that a company which has gone into liquidation is no longer a "company" within the meaning of Section 3, Income Tax Act, and therefore no income-tax can be assessed on the liquidators as representing the company. The word " company " is defined in Section 2 (6), Income Tax Act, as follows:

" ' Company ' means a company as defined in the Indian Companies Act, 1913. . . . "

The Agra Spinning and Weaving Mills Co., Ltd., was therefore a company within the meaning of the Income Tax Act. A company once formed and registered would continue to be a company until it is dissolved under Section 194, Companies Act. *Prima facie*, therefore, a company as defined in Section 2 (6), Income Tax Act, would include a company in liquidation.

The arguments against this conclusion are these: First of all, it is said that there can be no " principal officer " of a company in liquidation, and unless the " principal officer " of a company in liquidation, can be determined, no tax can be assessed. Reliance is placed on Section 22 (1), Income Tax Act, which runs as follows:

" The principal officer of every company shall prepare, and, on or before the 15th day of June in each year, furnish to the Income Tax Officer, a return in the prescribed form.. . . . "

The argument is that if there can be no principal officer of a company in liquidation, there can be no assessment, because the method of assessment laid down in the Income Tax Act cannot be followed. The expression " principal officer " is defined in Section 2 (12), Income Tax Act, as follows (we shall read only so much of it as is material for our purpose):

" ' principal officer ' used with reference to . . . . a company . . . . means the secretary, treasurer, manager or agent of . . . . the company, or any person connected with the . . . . company . . . . upon whom the Income Tax Officer has served a notice of his intention of treating him as the principal officer thereof."

It is true that when the winding-up order was made the previous officers of the company ceased to hold office, and thus the former secretary, treasurer, manager or agent disappeared from the scene. But we find that the liquidators are actually managing the business of the company, and we may safely take it that the liquidators come under the word " manager " as used in clause (*a*), sub-section (12), Section 2. The word " manager " is defined in the Companies Act as follows:

" Manager includes any person occupying the position of a manager, by whatever name called and whether under a contract of service or not."

It will, therefore, be noticed that the word " manager " used in Section 2 (12), Income Tax Act, has been used in a wide sense and is quite in keeping with the meaning assigned to it in the Companies Act. Further there is no difficulty in treating the official liquidators as the " principal officer " of a company if the Income Tax Officer serves a notice on them of his intention of treating them as the principal officers of the company, as he has already done in this case. The other arguments advanced against the inclusion of a company in liquidation in the word " company " as used in Section 3, Income Tax Act, are as follows: It is argued that in Section 10, Income Tax Act, certain items are pointed out as being liable to be set off against gross profits or gains of business for the purpose of discovering the net amount on which the tax has to be assessed. It is argued that under sub-section (2), Section 10, clause (3), if there be any borrowed capital, the interest paid on such capital is allowed to be deducted from the total income; but in the case of a company in liquidation which has debts to pay, the interest cannot be paid till the principal amount has been paid off, and thus, although interest may be accumulating, the liquidators would not get the advantage of clause (3). This argument is easily met by reference to sub-section (3), Section 10. It is further met in this way. If no interest has been actually paid, the official liquidators may not be entitled under the law to set it off against the income already earned; but this circumstance is no answer to the question as to whether the liquidators are liable or not to make a return for the purpose of assessment of income-tax. Again, when the interest is paid, say two or three years hence, they would be

entitled to set off the interest actually paid against the income then earned.

The next argument is that under clause (9,) sub-section(2), Section 10, a man doing business is entitled to set off against his income any expenditure incurred solely for the purpose of earning such profits or gains; but in the case of official liquidators it cannot be said that the whole of the expenditure in liquidation has been spent for the purpose of earning such profits or gains. This may be true. What the liquidators have to do is only to apportion a fair amount of the expenditure incurred in the liquidation in order to have it set off against the income earned by the working of the mills. The next argument is that Section 19A, Income Tax Act, makes it a duty of the principal officer of every company to send a statement of the names and addresses of shareholders who have received a dividend. It is argued that this is not possible in the case of official liquidators who have been managing the company which is insolvent. This may be true, but this leads to no conclusion; for there may be companies which are actually working and which are not paying any dividend. These would not be called upon to furnish any statement required by Section 19A, Income Tax Act. Lastly, it was argued that under Sections 40 and 41, Income Tax Act, all persons who were in the position of guardians, trustees or agents of persons residing outside British India, Administrators-General, Official Trustees and receivers or managers appointed by Courts are mentioned as persons liable to pay income-tax on behalf of the parties or properties in their charge, but there is no mention of an official liquidator. This argument is really destructive of the position taken up by the official liquidators. Two remarks may be made on this point. Sections 40 and 41 indicate that it was the intention of the legislature to cast its net, for the purpose of securing income-tax, as wide as possible, and it is impossible to believe that the legislature was forgetful of the fact that there might be companies in liquidation which were earning profits in the course of liquidation. There could not have been an intention on the part of the legislature to exempt such companies from taxation. If we are not allowed to read the word "company" in Section 3 as including a company in liquidation, surely the official liquidators would

come under the word "manager" used in Section 41, Income Tax Act. The word "manager," it is stated in Section 41 itself, includes any person, whatever his designation, who in fact manages property on behalf of another. Within this definition the liquidators must come. Our view is that a company in liquidation is included in the word "company" in Section 3, and it is not necessary to have recourse to Section 41 for the purpose of holding the liquidators liable.

It was argued that a company in liquidation would usually be an insolvent company and that may be one of the reasons why the legislature intentionally exempted a company in liquidation from the liability to pay income-tax. But it is not correct to say that only insolvent companies go into liquidation. A perfectly solvent company not burdened with any debt may go into liquidation by special resolution, *vide* Section 162 (1), Companies Act. It is possible to imagine cases where a company, otherwise in a prosperous condition, may decide to wind up its business. Let us take this case. The sugar factories in Java may be doing very good business, and their main source of income is from exportation of sugar to India. The Indian Government gives protection to sugar by imposing a heavy tax against imported sugar. A prosperous company in Java may find that it would be difficult for it to sell its sugar in India and it may, therefore, decide to wind up its business, although so far the business had been prosperous. Examples like this may be multiplied. Therefore, there is no basis for the argument that every company in liquidation must be working at a loss and cannot earn any profits which may be liable to taxation.

One of the arguments advanced on behalf of the liquidators was that if the income-tax authorities assess a tax and it is not paid, they may seek to enforce payment in one of the ways laid down in law against the property of the company in liquidation, but Section 171 would stand in their way of taking any proceedings against the company's property. Two answers can be given to this argument. The first is that where a tax is justly and legally leviable, there would be no difficulty in obtaining the leave of the Court to enforce payment of the tax. This would satisfy the requirements of Section 171, Companies Act. The second answer is that the right of the Crown to enforce payment

of its dues cannot be taken away by a statute which does not expressly enact to that effect. By mere implication the Crown's right and remedy cannot be barred. This was held in the case of *West Laikdih Coal Co., Ltd.* The view taken there is supported by English decisions. We agree with that view. The result is that we see no difficulty in the way of the income-tax authorities in calling upon the official liquidators to furnish a return in accordance with Section 22 (1), Income-tax Act. This is our answer to the question. We allow counsel for the income-tax authorities one day's fee, which we assess at Rs. 200. He will certify payment of the fee to him within 30 days as required by the rules of the Court.

Questions answered.

[IN THE RANGOON HIGH COURT.]

COMMISSIONER OF INCOME TAX, BURMA

v.

N. N. FIRM.

Page, C. J., Das and Mya Bu, JJ.

July 11, 1933.

INCOME TAX—SUCCESSION TO BUSINESS—ESSENTIAL CONDITIONS—JOINT HINDU FAMILY BUSINESS—PARTITION—DIVISION OF BUSINESS BETWEEN MEMBERS—NO SUCCESSION—INDIAN INCOME TAX ACT (XI of 1922), Section 26.

A joint Hindu family consisting of five members carried on a money-lending business. The members decided to partition the family property and between October and December 1929, when the partition was referred to arbitration, no fresh loans were advanced. Under the partition one of the members received a one-fifth share of the assets of the business. The other four members carried on the business at the old premises in the manner in which it had been carried on before the partition: Held, *that, upon these facts there was no "succession" to the money-lending business of the joint family within Section 26 (2) of the Income-tax Act.*

In order that a person should be held to have "succeeded" another person in carrying on a business, profession, or vocation, it is necessary that the person succeeding should have succeeded

his predecessor in carrying on the business as a whole. Where a business is split up and thereafter another person carries on part of the business he does not "succeed" his predecessor in carrying on the business within Section 26 (2). Further, where there is no continuity in carrying on the business and when one business has come to an end and after a time another business is started, it may be with the same assets and under the same conditions and in the same premises as the old business, the persons carrying on the new business do not "succeed" those who had carried on the old business within Section 26 (2) of the Act.

Cases referred to:

BELL *v.* NATIONAL PROVINCIAL BANK OF ENGLAND [1904] (1 K. B. 149; 73 L. J. K. B. 142; 5 TAX CAS. 1; 20 T. L. R. 97).

STOCKHAM *v.* WALLASEY URBAN DISTRICT COUNCIL [1906] (95 L. T. 834).

WESTERN INDIA TURF CLUB, LTD. *v.* COMMISSIONER OF INCOME TAX, BOMBAY [1926] (50 BOM. 648; 98 I.C. 226; 2 I.T.C. 227; 28 BOM. L. R. 1236).

WILSON *v.* CHIBBETT [1929] (14 TAX CAS. 407).

REYNOLDS, SONS & CO., LTD. *v.* OGSTON [1930] (15 TAX. CAS. 501; 9 A. T. C. 8).

MAHARAJADHIRAJ OF DARBHANGA *v.* COMMISSIONER OF INCOME TAX [1933] (I.L.R. 12 PAT. 5; A.I.R. 1933 PAT. 123; 144 I.C. 354; (1933) 1 I. T. R. 206).

Case stated by the Commissioner of Income-tax, Burma, under Section 66 (3) of the Income-tax Act, 1922 [Civil Ref. No. 17 of 1933].

Eggar, for the Commissioner.

Basu, for the assessee.

PAGE, C. J.—The question propounded is:

"Whether in this case the Income-tax Officer was justified in holding that the assessees had succeeded to the N. N. family business."

The question is not happily worded, the real question being whether upon the facts as found, the Income-tax Officer correctly held that the assessees had "succeeded" to the joint family

business carried on under the *vilasam* of N. N. The material facts are as follows: An undivided Hindu joint family consisting of N. N. Nachiappa Chettyar, his three sons and his grandson carried on a family business of money-lending and rice-milling at Bassein. In 1929, the members of the joint family decided to partition the family property, and between October and December 1929, when the partition of the family property was referred to arbitration, no fresh loans were advanced by the N. N. firm. Under the partition N. S. M., one of the members of the family, received, *inter alia*, a one-fifth share of the assets of the money-lending business, and thereafter started a new money-lending business on his own account under a different name and in new premises. As it was considered undesirable by the family that the rice-mill should be sold and the proceeds of the sale divided into five parts, it was arranged between the members of the family that the four other members of the family should buy out N. S. M. by giving him credit in the partition for one-fifth of the value of the rice-mill.

There can be no doubt and the assessees do not dispute it, that the four members of the family who purchased the share of N.S.M. in the rice-mill and continued to carry on the rice-milling business as their own, in the manner that theretofore had obtained, "succeeded" to the business that had been carried on by the Hindu joint family in the mill. So far as the money-lending business was concerned it appears that the four members of the family other than N.S.M. carried on business at the old premises in the manner in which it had been carried on before the partition took place, and that N. N. Nachiappa, his two sons and his grandson on 19th January, 1930, even before the arbitrators issued their award on 5th February, 1930, opened new accounts in the old business premises, pooling the assets and liabilities of the business that fell to their share in the partition with a view to forming a partnership for carrying on the business that had belonged to the Hindu joint family. Upon those facts the income-tax authorities have held that there was a "succession" to the money-lending business of the undivided joint family within Section 26 (2), Income-tax Act. In my opinion it is manifest that there was not a "succession" within Section 26 (2) of the Act. In order that a person should be held to have "succeeded"

another person in carrying on a business, profession or vocation, it is necessary that the person succeeding should have succeeded his predecessor in carrying on the business as a whole. Where a business is split up and thereafter another person carries on part of the business I am of opinion that he does not "succeed" his predecessor in carrying on the business within Section 26 (2). Further, where there is no continuity in carrying on the business and when one business has come to an end and after a time another business is started, it may be with the same assets and under the same conditions and in the same premises as the old business, the persons carrying on the new business do not "succeed" those who had carried on the old business within Section 26 (2) of the Act.

In the present case, it is found as a fact that N. N. Nachiappa Chettyar, his two sons and his grandson did not carry on or take over from the joint family the whole of the business that had been carried on by the joint family, and also that for three months prior to the partition the business carried on by the Hindu joint family had been discontinued: *Bell* v. *National Provincial Bank of England*; *Stockham* v. *Wallasey Urban District Council*; *Western India Turf Club, Ltd.* v. *Commissioner of Income-tax, Bombay*; *Wilson* v. *Chibbett*; *Reynolds, Sons & Co., Ltd.* v. *Ogston* and *Maharajadhiraj of Darbhanga* v. *Commissioner of Income-tax*. For these reasons I will answer the question propounded in the negative, costs ten gold mohurs.

DAS, J.—I agree.

MYA BU, J.—I agree.

Reference answered.

[IN THE KING'S BENCH DIVISION.]

CORRY *v.* ROBINSON; ROBINSON *v.* CORRY.

Finlay, J.

July 17, 1933.

INCOME TAX—CIVIL SERVANT EMPLOYED BY ADMIRALTY ABROAD—SALARY AND SPECIAL ALLOWANCES PAID ABROAD—OFFICIAL RESIDENCE PROVIDED—LIABILITY TO TAX—(ENGLISH)

INCOME TAX ACT, 1918 (8 & 9 GEO. 5 c. 40), SCHEDULE E, RULES 1, 6, 18 (2).

An established civil servant, who is sent abroad by the Admiralty to fill an appointment abroad, exercises a public office or employment under the Admiralty and the salary paid to him abroad in respect of such public office is assessable to income tax under Schedule E. A colonial allowance granted as compensation for the extra expense of residence outside the United Kingdom, and house allowance, paid in addition to the salary, are similarly chargeable, but the value of an official residence which the civil servant occupies on condition not to let it in whole or in part does not count as income for purposes of income tax.

TENNANT *v.* SMITH [1892] (61 L. J. P. C. 11; [1892] A. C. 150), *applied.*

Cases referred to:—

COLQUHOUN *v.* BROOKS [1889] (59 L.J.Q.B. 53; 14 App. Cas. 493; 2 Tax Cas. 490).

CORDY *v.* GORDON [1925] (94 L.J.K.B. 670; [1925] 2 K.B. 276; 9 Tax Cas. 304).

DIGGINES *v.* FORESTAL LAND, TIMBER AND RAILWAYS CO. [1930] (142 L.T. 509).

MACHON *v.* MCLOUGHLIN [1926] (11 Tax Cas. 83).

PICKLES *v.* FOSTER [1912] (82 L.J.K.B. 121; [1913] 1 K.B. 174; 6 Tax Cas. 131).

PICKLES *v.* FOULSHAM [1923] (93 L. J. K. B. 197; [1924] 1 K. B. 323; affirmed in H. L. [1925] (94 L. J. K. B. 418; [1925] A.C. 458; 9 Tax Cas. 261).

PROCTOR *v.* RYALL [1928] (14 Tax Cas. 204).

TENNANT *v.* SMITH [1892] (61 L.J.P.C. 11; [1892] A.C. 150; 3 Tax Cas. 158).

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts under the Income Tax Act, 1918, Section 149.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at Glasgow on March 1, 1932, for the purpose of hearing appeals, the appellant, Mr. E. W. C.

Corry, of the Royal Naval Torpedo Factory, Greenock, appealed against assessments to income tax under Schedule E, of £ 1,053 10s., £1,342 and £1,194 2s. 8d, for the three years ended April 5, 1930, 1931 and 1932, respectively, made upon him by the Commissioners of Income Tax for the Admiralty as Deputy Cashier H. M. Naval Base at Singapore.

The appeal, although against assessments made in London and originally set down for hearing in London, was heard in Glasgow to suit the appellant's convenience.

At the hearing of the appeal before the Commissioners, the following facts were either proved or admitted :—

The appellant was an established civil servant and on July 19, 1928, he left the United Kingdom, retaining no residence therein, to take up an appointment as Deputy Cashier in H.M. Naval Base at Singapore. This appointment was approved by the Lords Commissioners of the Admiralty in May, 1928, to date August 1, 1928 ; the official salary in respect of the appointment was payable to, and received by, the appellant in the Straits Settlement from August 1, 1928, to July 24, 1931, during his residence in that colony.

The appellant's official salary for the period from July 25, 1931, to September 30, 1931, during his return voyage from the Straits Settlement and during the subsequent leave of absence granted to him in respect of his service in the colony, was payable and paid to him in London, except as to the sum of £52, which he received in the colony as an advance.

Upon his return from Singapore, the appellant landed in the United Kingdom on September 22, 1931. In August, 1931, he was appointed Deputy Cashier at H. M. Torpedo Factory, Greenock, where he was still serving at the date of this appeal. The appointment to Greenock was to date from October 1, 1931. From July 19, 1928, until October 1, 1931, the appellant was not resident in the United Kingdom.

The appellant was entitled while in the colony either to be provided with housing accommodation or to be paid an allowance for house rent at a rate fixed by the Admiralty with the consent of the Treasury for persons of the appellant's rank. An official house as provided by the Admiralty could only be occupied on

condition that it was not let, in whole or in part, to anyone whatsoever.

The appellant occupied an official house in Singapore from August 20, 1928, to September 20, 1928. For the remainder of his residence there he provided himself with a house. From June 15, 1930, to April 29, 1931, however, he received no allowance for rent for such house, on account of a dispute which had arisen as to the quality of housing accommodation to be provided.

The house allowance ultimately received by the appellant was more than sufficient to pay the rent of the house with which he provided himself, but he incurred the expenses of a motor car as a conveyance to and from his place of duty.

The salary paid to the appellant while in Singapore was the same as that payable for a similar office in the United Kingdom. As an addition to it, however, he received in the colony a colonial allowance at a rate fixed for persons of his rank, such allowance being granted as compensation for the extra expense of residence outside the United Kingdom.

The appellant's salary and allowances were paid under the following Admiralty Regulations:—

"263. When the rate of salary is not stated in the order appointing a person to a vacancy, the scale of salary previously allowed to the office is to be continued unless it has been previously ordered to be reduced on a vacancy.

"264. Allowances in addition to civil salary to officers 'not borne on ships' books, such as fixed periodical sums for special services, are payable for the same period as salary, unless directed otherwise. Colonial allowances and allowances for house-rent are to be paid from the day the officer joins the establishment until the day he is discharged from its books, subject, however, in the case of colonial allowances to the limitations imposed by Article 278.

"278. Colonial allowances, or allowance granted to meet increased cost of living, are payable to Officers of Naval Establishments abroad, during absence on ordinary or sick leave from the colony in which those establishments are situated when they proceed to visit a place in a neighbouring country,

but in the case of an officer who proceeds to the United Kingdom, payment of colonial allowance should cease on the date preceding that of arrival in the United Kingdom, and should recommence on the day following that of departure.

"279. Officers of Naval Establishments abroad who are entitled to house rent allowances are to receive them when on temporary leave of absence."

The appellant was assessed to income tax in respect of all the cash payments received by him under his appointments in the United Kingdom and in Singapore for the three years 1928-29, 1929-30 and 1930-31, and included with such payments for purposes of assessment was the value of the official house calculated for such period as the appellant occupied it in the course of his residence in the colony.

Before his departure from the United Kingdom, while abroad, and after his return to the United Kingdom, the appellant belonged to the same class in the service of the Admiralty. His salary, apart from the allowances already mentioned, was that of his class throughout.

Upon vacating his office in the United Kingdom in order to take up that in Singapore, the appellant was followed by a successor. Upon taking up his office in Singapore, he followed a predecessor, and he was followed by a successor on vacating it.

No order had been made by the Treasury under rule 10 of Schedule E of the Income Tax Act, 1918, with respect to the class of persons to which the appellant belongs.

The appellant contended: (1) that the office in question was one which he had held and exercised wholly abroad and that his income from it was not subject to taxation within the United Kingdom under Schedule E of the Income Tax Act, 1918; (2) that the value ascribed to housing accommodation provided for him while abroad was not income taxable under Schedule E; (3) that neither colonial nor house allowance payable to him in the colony was income chargeable to tax under Schedule E; or, alternatively, that both such allowances were deductible in the computation of such income; (4) that the cost of providing himself with housing accommodation from June 15, 1930, until

April 29, 1931, was deductible in the computation of such income as might be chargeable to tax.

On behalf of the Crown it was contended: (1) that the appellant's official emoluments received in the Straits Settlement were subject to taxation under Schedule E of the Income Tax Act, 1918 ; (2) that the value ascribed to housing accommodation provided officially for the appellant fell within the words " salaries, fees, perquisites or profits whatsoever " appearing in rule 1 of the Schedule [1] and were as such taxable ; (3) that the colonial and house allowances paid to the appellant fell within the same words and were similarly taxable ; (4) that no cost of providing himself with housing accommodation was deductible by the appellant in computing the income chargeable to tax ; (5) that the assessments were correctly made.

The Commissioners were of the opinion (1) that both the salary and the allowances paid to the appellant in respect of his appointment in the Straits Settlement were rightly charged to income tax under Schedule E ; and (2) that the inclusion in the assessment of the value ascribed to the official residence provided for the appellant could not be supported, and that the assessment must be amended accordingly. Mr. Corry appealed against the first part of the decision, and the Crown against the second.

Needham, K. C., and *Cyril King*, for the appellant.—Mr. Corry's appointment having been exercised wholly outside the United Kingdom, payments made to him in respect of it are not assessable to income tax under Schedule E. The tax is charged under rules 1 and 6 of the Schedule, and the words " within the United Kingdom " in rule 6 [2] apply to all the offices

(1) Income Tax Act, 1918, Schedule E, Rule 1. "Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule, or to whom any annuity, pension, or stipend, as described in this Schedule, is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, except as otherwise provided. . . ."

(2) Income Tax Act, 1918, Schedule E, Rule 6: "The tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom or by the officers hereinafter respectively described, namely . . . (c) public offices under the civil government of the Crown, or in any country palatine, or the Duchy of Cornwal ; . . . (k) all other public offices, or employments of profit which are of a public nature."

and officers mentioned in that rule and govern the present case. Rule 18[1] deals merely with the mode of assessment; it is a rule of machinery applicable only to those who are already chargeable with tax by virtue of rules 1 and 6. In this case it is sought thus to make Mr. Corry chargeable by reference to rule 18: a similar argument was used in the case of *Pickles* v. *Foster*, where it was attempted by the Crown to establish that the terms of Section 147 of the Income Tax Act of 1842, now replaced by rule 18, sub-rule 2 of Schedule E of the Income Tax Act, 1918, brought into charge a person who was not chargeable under that part of Section 146 which is now replaced by rules 1 and 6 of Schedule E of the 1918 Act. That argument was later criticised by Rowlatt, J., in *Proctor* v. *Ryall*. In the case of *Diggines* v. *Forestal Land, Timber and Railways Co.*, Lawrence, L. J., clearly lays down the manner in which the charging section of an Act must be looked at before rules of machinery are applied.

Mr. Corry is entitled to deduct, in computing his income for tax purposes, the amounts paid to him as housing and colonial allowances: it cannot be argued on the one hand that his appointment is exercised within the United Kingdom and on the other hand that he is to be taxed in respect of allowances which are made to him to enable him to perform the duties of an office exercised outside the United Kingdom.

The Solicitor-General (*Sir Boyd Merriman, K. C.*), and *R. P. Hills*, for the Crown.—In the case of *Pickles* v. *Foster* it was assumed that, had the office there in question been one held under the Government, it would have been chargeable to tax under what is now rule 18, sub-rule 2, of the Act of 1918. The reasons given in the case of *Pickles* v. *Foulsham* for the decision that the appointment there in question, although its

(1) Income Tax Act, 1918, Schedule E, Rule 18. "(1) The tax shall be assessed and charged by the respective commissioners for all the offices in each department, in the place where the said commissioners execute their offices, although certain of the offices in the same department may be executed elsewhere.

"(2) A person chargeable in respect of an office or employment of profit shall be deemed to exercise it at the head office of the department under which it is held, and shall be assessed and charged at that head office, although the duties of the office or employment are performed, or any profits thereof are payable elsewhere, whether within the United Kingdom or not."

duties were performed wholly abroad, did not constitute a foreign possession, apply *a fortiori* to the case of a British civil servant, who only works abroad as a part, or during a period, of his duties, and whose salary is paid to him out of the Consolidated Fund. The fact that all the duties under an appointment are for a certain period and the fact that all the duties under a contract are performed outside the United Kingdom are equally inadequate to constitute such appointment or contractual rights a foreign possession. A servant of the Crown holds a post within the United Kingdom, and he continues to hold that post wherever he may from time to time be moved and called upon to perform the duties of his post.

The housing and colonial allowances were paid to Mr. Corry in cash and are therefore not deductible in computing his income for taxation purposes. This is laid down in *Cordy* v. *Gordon*, and *Machon* v. *McLoughlin*. Even if Mr. Corry had been obliged to spend every penny of the allowances, they would still not have been deductible ; this is shown by *Cordy* v. *Gordon*.

The value of the official house provided for Mr. Corry is taxable for such period as he occupied the house ; *Tennant* v. *Smith* is distinguishable because in that case the house in question was subject to taxation under Schedule A. When Mr. Corry elects not to receive an official house in which to live, he receives a housing allowance instead, and there is no reason to distinguish between the two circumstances.

Needham, K. C., in reply.—Mr. Corry's case is not that of a naval officer whose base is the United Kingdom, temporarily outside the United Kingdom with his ship, and who clearly comes within the rule. To place the two cases on the same footing is to confuse an office with rank. With regard to the value of the official house occupied by Mr. Corry, such value is clearly not assessable to tax, and the present case is fully covered by *Tennant* v. *Smith* and *Cordy* v. *Gordon*.

FINLAY, J.—In my opinion, the decision of the Commissioners here was correct, and I think that both the appeal on behalf of Mr. Corry, which is no doubt the main appeal, and also the cross-appeal of the Crown, fail.

Mr. Corry's appeal raises a point no doubt of much importance, as is pointed out in the decision of the very experienced

Special Commissioner, Mr. Williamson, who gave his views at length, his colleague, Mr. Braithwaite, concurring, but concurring with obvious doubt and hesitation. Mr. Williamson, as I say, points out that the matter is of importance, because, as is not disputed, for a very long period assessments have been made upon the assumption that persons in the position occupied by the appellant here are chargeable to income tax. I entertain no doubt—I am entitled, I suppose, to use certain knowledge which I possess, or used to possess, of these things—that a startling revolution would be effected in income tax practice if it were now held that no tax was exigible in these circumstances. Of course, that does not in any way relieve me from the necessity of ascertaining what is the law, after looking at the schedule and at any cases which may be material.

The facts are found and can be quite concisely stated. The appellant, Mr. Corry, is an established civil servant. On July 19, 1928, he left for Singapore, because he had been appointed by the Lords Commissioners of the Admiralty, Deputy Cashier in His Majesty's Naval Base at Singapore. He left on that date, and he continued for several years to occupy the position of Deputy Cashier, and in that position he received the pay appropriate to his rank in the Civil Service. He also received a house allowance, and what is called a colonial allowance, which was in effect an allowance in addition to income, designed to meet the hardship of living abroad and the extra expenditure likely to be incurred by officials who, for one reason or another connected with their work, are compelled to live abroad.

Those really are substantially the whole of the facts. There is a paragraph in the Case, paragraph 8, to which a good deal of attention was directed. It points out that the appellant, while abroad and since his return, has belonged to the same class in the service of the Admiralty. In his tenure of office in the colony he followed a predecessor; he was followed there by a successor, and followed by a successor when he vacated his office in the United Kingdom. The main question is whether he is chargeable under Schedule E.

The actual charge is, I suppose, to be found in Schedule E itself: "Tax under Schedule E shall be charged in respect of every public officer or employment of profit, and in respect of

every annuity, pension, or stipend payable by the Crown or out of the public revenue of the United Kingdom, other than annuities charged under Schedule C . . ." That, in effect, imposes a tax in respect of public offices or employment of profit. There are various rules. Rule 1 imposes a tax on "every person having or exercising an office or employment of profit." Rules 2 and 3, rule 4, which is repealed, and rule 5, do not appear to matter. Rule 6 is: "The tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom or by the officers hereinafter respectively described, ..." Then there is a catalogue of those offices and officers belonging to either House of Parliament, and to any Court of justice, those under the civil government of the Crown, and then officers in His Majesty's Navy, commissioned officers in His Majesty's military forces, commissioned officers in His Majesty's Air Force. Then the catalogue leaves officers and returns to offices, and there are a series of offices which are charged, ending with a sort of sweeping clause : "all other public offices, or employments of profit which are of a public nature." Rules 9 and 10, I need not read, but they should just be referred to because a point, upon which I shall say a word later, arises with reference to them. Then there is rule 18, I think quite correctly described by counsel for the appellant as machinery, but none the less important, because, as all the world knows, at all events since *Colquhoun* v. *Brooks*, that, while the main thing to look at is the charging section, and while, if you do not get a person within the charging section, machinery will not get him there, it may be important in considering the ambit of charge to see what is the machinery which the Legislature has provided. Rule 18 (2) is as follows: [His Lordship read the sub-rule; and continued :] I assent to the view that if the charging schedule itself is not wide enough to cover an office held under the Admiralty where, in fact, the duties of the office are performed outside the United Kingdom, this machinery section will not suffice to bring it into charge. But, when I look at the charging schedule, I see nothing to cut it down in the way suggested. On the contrary, I think, upon reading what are called the charging parts of the schedule, apart from the aid given by this machinery rule, that the correct view, and the view that I take, is that public offices and employments

under the Admiralty, under the Treasury, under the War Office, and so on, are taxable, and taxable wherever the particular person may happen to perform the duties of his office. That appears to me to be the fair result looking at the words of the Act alone.

I was referred to several cases. *Pickles* v. *Foster* appears to me to throw little light on the present case. In that case there was an argument referred to very unfavourably in a later case by Rowlatt, J., the object of which was to convince Horridge, J., that you could stretch the word "Department" sufficiently to make it have reference to the case of employment under an ordinary trading company. That argument was rejected, but I see nothing in the judgment of Horridge, J., to suggest that he would have been of opinion that a person who was in the service of the Crown fell outside the tax merely because his work was, so to speak, performed abroad. *Pickles* v. *Foulsham*, the second case, has no direct bearing, I think, upon the present case. I think counsel was right about that, but it is useful to observe the grounds—more than one ground—upon which in that case the learned Lords held that the office could not be considered to be a possession abroad, because it was an office under which the remuneration was paid and payable in Liverpool. I need say no more about that. With regard to *Proctor* v. *Ryall*, I accept, and accept absolutely, the observations which Rowlatt, J., made in that case with regard to transactions and rules as to machinery, and the proper use to make of such sections and rules with reference to charging sections; but I see nothing in the decision of Rowlatt, J., to conflict in any way with the conclusion at which I have arrived.

The substance of my view can be put quite shortly. I think the true view is that in the case—I am not dealing with trading companies at all now—of an employment under the Crown, the case that is, of a person who holds an office, whatever it may be, in one of the Departments of State, then that person is assessable to tax, and assessable to tax wherever may be the precise place, whether in the United Kingdom, or partly in the United Kingdom and partly abroad, or for the time being wholly abroad, where he exercises his functions and does his work. Upon that

ground I decide the main point in favour of the Crown. I think that the view of Mr. Williamson, concurred in as I have said—and it is proper that it should be mentioned—with obvious doubt and hesitation by Mr. Braithwaite, was correct.

There were one or two other points on which Mr. Corry appealed. Were the allowances paid to him for a residence and for extra cost of living assessable ? or were they deductible ? With regard to this point, it seems to me to be clear that these sums are assessable and do not form the subject of deduction. What it really comes to is this : that extra money does go into the appellant's pocket. Extra money goes into his pocket, partly in order that he may be able to provide himself with a house, and partly in order that he may be able to meet those expenses incidental to residence in a far-off country in the tropics. There is really very little more to be said on this issue. I am not going to review the authorities, but it seems to me to be clear, both on principle and as the result of several authorities to which my attention was called, that the deduction cannot be allowed, and that this claim of the appellant, which was to deduct these amounts, must fail. I may refer merely in passing to the judgment of Rowlatt, J., in *Cordy* v. *Gordon* where the principle is very clearly laid down.

It is useful that I should refer to that case because it leads me to the next point, the last, which is the basis of the Crown's appeal. Upon that, I again agree with the definite view which seems to have been arrived at by both the Special Commissioners, for Mr. Braithwaite's hesitation does not extend to this point at all. The view of the Crown is, that the value of the house which, during part of the time was occupied by the appellant, ought to be counted as part of his income. I do not think that that is so. *Tennant* v. *Smith*, the leading case in the House of Lords, is a clear authority against the proposition. The distinction was quite correctly pointed out to me by the learned Solicitor-General that in that case the house was the subject of taxation under Schedule A. I do not think that that was the real basis of the decision, which was, in my opinion, that the house was neither money nor anything that could be turned into money. I am confirmed in that view by a passage to which counsel called my attention at the beginning of the judgment of

Rowlatt, J., in *Cordy* v. *Gordon*, where he said (94 L.J.K.B., at page 671; [1925] 2 K. B. at page 282; 9 Tax Cas. at page 308): "If the holder of an office receives a salary in money, and in addition to that salary receives some advantage such as residence, or residence with board and washing, of which he is obliged to avail himself and which he cannot in any case transfer to another for profit to himself, the amount of his income for purposes of taxation is limited to what he receives in cash." Then the learned Judge refers to *Tennant* v. *Smith*. In this state of the authorities, it seems to me to be reasonably plain that the appeal of the Crown must fail on this ground, which I am told has been acted upon by Rowlatt, J., in other cases, that, after all, the tax is on income, that is, on what goes into the taxpayer's pocket; and that the mere fact that he may be saved something by being given a house does not constitute income for this purpose. Nothing goes into his pocket, and on that ground, and following and, as I conceive it, applying the decision in *Tennant* v. *Smith*, I think I must decide the Crown's appeal against the Crown. The result is that both the appeal and the cross-appeal fail and must be dismissed.

Appeals dismissed.

Solicitors—Linklaters and Paines, for appellant; *Solicitor of Inland Revenue*, for the Crown.

[IN THE PATNA HIGH COURT.]

COMMISSIONER OF INCOME TAX, BIHAR & ORISSA.

v.

MANAGER OF KATRAS ENCUMBERED ESTATE.

Courtney-Terrell, C. J., Kulwant Sahay and James, JJ.

November 29, 1933.

INCOME—LEASE OF MINE TO CREDITOR—DIRECTON TO APPLY ROYALTY TO LIQUIDATION OF DEBT—ROYALTY SO APPLIED, WHETHER INCOME OF DEBTOR.

The assessee, who was the owner of a mine, mortgaged it to one of his creditors and, on the same day, leased it to the creditor at a royalty. A minimum royalty of Rs. 8,000 a year was to be paid and that sum was to be paid to the assessee himself. The

balance of such royalty as might be payable was to be applied by the mortgagee to the liquidation of the debt. The assessee claimed that the excess of royalty over Rs. 8,000 could not be considered as his income: Held, *that the whole of the royalties were the income of the assessee and assessable to income-tax as such. The case was not one of allocation out of the revenue before it became the assessee's income, but a case of application by the assessee of part of his income in a particular way.*

BEJOY SINGH DUDHURIA v. COMMISSIONER OF INCOME-TAX, BENGAL [1933] (60 I.A. 196; 60 Cal. 1029; 37 C.W.N. 885; 143 I.C. 145; (1933) 1 I.T.R. 135; A. I. R. 1933 P.C. 145), *distinguished.*

Case stated by the Commissioner of Income-tax, Bihar and Orissa [Miscellaneous Judicial No. 157 of 1932].

Manohar Lal, for the Commissioner of Income-tax.

K. P. Jayaswal, C. S. Jayaswal and *S. M. Gupta,* for the assessee.

COURTNEY-TERRELL, C. J.—This is a case stated under Section 66, sub-section (2), Income-tax Act, for the opinion of the Court. The facts which have given rise to the case are simply stated. The assessee is the proprietor of a certain mine producing coal and fireclay. In the month of June 1920, the late proprietor of the mine owed a sum of four lakhs of rupees to a company. By March 15, 1921, the amount due to the company including the first loan and a subsequent loan amounted to Rs. 12,19,071 and to secure the re-payment of this sum the proprietor mortgaged the mine to the company on that date. On the same day the proprietor executed a lease of the mine to the same company at a royalty and it was provided that a minimum sum of Rs. 8,000 a year was to be paid and that that sum of Rs. 8,000 was to be paid to the proprietor himself. The balance of such royalty as might be payable was to be applied by the morgagees lessees to the liquidation of their debt under the mortgage. The question is as to whether the entire royalty to be paid by the lessees is to be taxed when it comes into the hands of the proprietor as his income.

The argument has been raised on behalf of the assessee that inasmuch as all excess of royalty over and above Rs. 8,000 was

retained by the lessee-mortgagees and did not come into the hands of the assessee, it could not be considered as income and reliance was placed upon the judgment of the Privy Council in *Bejoy Singh Dudhuria* v. *Commissioner of Income-tax, Bengal*. In that case the assessee had inherited an estate, the income of which was charged with a payment to his mother and it was held that the amount of the income payable to the lady was not part of the income of the assessee. It was specifically stated in the judgment of their Lordships that it was not a case of the application by the assessee of part of his income in a particular way, but it was a case of the allocation of the sum out of the revenue before it became the income of the assessee. Inasmuch as the assessee owed a sum of money to the lessee he stipulated that the lessee instead of paying the whole of the royalties direct to him should use a part of the royalties in discharging the debt which was owed by the assessee to the lessee. The whole, therefore, of the income was the income of the assessee. The position does not in the least differ from what it would have been had the provision been that the lessee was to pay the whole of the royalty direct to the assessee and then that the assessee was to pay back a portion of the royalty to discharge his debt to the lessee. It cannot be argued that in such a case the whole of the income would not have to be considered as the income of the assessee and the case in question does not differ from that in its nature. In our opinion the assessee has rightly been assessed in respect of the income in question. The assessee must pay the costs of this inquiry. Hearing fee five gold mohurs.

KULWANT SAHAY, J.—I agree.

JAMES, J.—I agree.

Order accordingly

[IN THE BOMBAY HIGH COURT.]

TATA HYDRO-ELECTRIC AGENCY LTD.

v.

COMMISSIONER OF INCOME-TAX, BOMBAY.

Beaumont, C. J., and Blackwell, J.

September 15, 1933.

INCOME TAX—REFERENCE—POWER TO DIRECT STATEMENT OF CASE ON ORDER MADE IN REVISION—POWER TO STATE CASE *suo motu*—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 33, 66 (1), (2)—SPECIFIC RELIEF ACT (I OF 1877), SECTION 45.

*There is no obligation on the Commissioner of Income Tax to state a case on an order made in the exercise of his power of revision under Section 33 of the Indian Income Tax Act and the High Court has no jurisdiction under Section 45 of the Specific Relief Act to direct him to state a case arising out of such an order.**

The Commissioner may, however, on his own motion or on a reference by any authority subordinate to him, make a reference under sub-section (1) of Section 66 of the Income Tax Act, even after the case has been decided.

ABDUL KADIR MARAKAYAR & CO., *In re* [1926] (49 MAD. 725; 99 I. C. 221; A. I. R. 1926 MAD. 1051; 51 M.L.J. 650; 24 L.W. 664), *not followed.*

ALCOCK ASHDOWN & CO. *v.* CHIEF REVENUE AUTHORITY, BOMBAY [1923] (50 I.A. 227; 47 BOM. 742; 75 I.C. 392; A.I.R. 1923 P. C. 138; 28 C. W. N. 762; 25 Bom. L.R. 920), *distinguished.*

V. E. A. CHETTIAR FIRM *v.* COMMISSIONER OF INCOME TAX, BURMA [1930] (7 Rang. 581; 121 I. C. 769; A. I. R. 1930 Rang. 37), *followed.*

Application under Section 66 (2) of the Income-tax Act to require the Commissioner of Income-tax, Bombay, to state a case.

* [Under the Income-tax (Second Amendment) Act, 1933, provision is made for reference on orders made under Section 33, with a proviso that "a reference should lie from an order under Section 33 only on a question of law arising out of that order itself and not on a question of law arising out of a previous order under Section 31 or Section 32 revised by the order under Section 33."—Ed.]

F. J. Coltman, for the petitioners.

Jamshed Kanga, for the Commissioner.

BEAUMONT, C.J.—This is a petition asking us to direct the learned Commissioner of Income-tax to state a case for the opinion of this Court The petition is presented under the Specific Relief Act, 1877, and the Income-tax Act, 1922. It is a case in which the learned Commissioner himself sent for the papers under Section 33 of the Act and set aside an order which had been made by the Assistant Commissioner in favour of the assessee, and assessee desires to bring a question of law which arises before this Court. The contention of the Commissioner is that the Court has no jurisdiction to direct him to state a case. The question depends primarily on Section 66, Income-tax Act, because unless there is an obligation under that section on the Commissioner to state a case, it is clear that we cannot compel him to state a case under Section 45, Specific Relief Act. Sub-section (1) of Section 66 (so far as material) provides that if in the course of any assessment under the Act or any proceeding in connexion therewith a question of law arises, the Commissioner may on his own motion draw up a statement of the case and refer it with his own opinion thereon to the High Court. The language of that sub-section is clearly permissive. Then under sub-section (2), where an order has been made under Section 31 or Section 32 the assessee may require the Commissioner to refer a question of law to the High Court, and under sub-section (3) if the Commissioner refuses to state a case on the ground that no question of law arises, the assessee may apply to the High Court, and the High Court may, if it thinks fit, require the Commissioner to state a case. But there is no express obligation upon the Commissioner to state a case on an order arising under Section 33, and this Court has no power to compel him to exercise his discretion in any particular manner. It is true that this seems to disclose a serious omission from the Income-tax Act, because it is open to the Commissioner in any case to send for the papers under Section 33 and make an order, and thereby deprive the assessee of his right to bring the matter before the Court under sub-section (2) or sub-section (3) of Section 66. It is said by Mr. Coltman on behalf of the petitioners that although there is no express obligation upon the

Commissioner to state a case, the authorities show that such an obligation exists.

He relies in the first place on the case of *Alcock, Ashdown & Co.* v. *Chief Revenue Authority, Bombay.* But that case was decided by the Privy Council on Section 51 of the Income-tax Act of 1918, and that section is differently worded to Section 66 of the Act of 1922. The whole scheme as to reference to the Court has been redrafted, and the Act of 1922 expressly deals with the cases in which the Court can require the Commissioner to state a case. In my opinion, therefore, it is useless to look at authorities on the former Act. Then the next case relied upon is the decision of the Madras High Court in *Abdul Kader Marakayar & Co., In re.* That is an authority directly in favour of the petitioners. The Court did in that case hold that in cases coming under Section 33, Income-tax Act, the Commissioner is bound to state a case to the High Court if in the course of inquiry under that section any question of law arises in the case. It was held further that that being so, it was within the power of the High Court to require him to state a case under Section 45, Specific Relief Act.

The Court purported to follow the Privy Council case to which I have referred and relied also upon the unfortunate consequences, to which I have alluded, which follow if the Commissioner is not bound to state a case in respect of an order under Section 33. But Courts have to construe an Act as they find it, and, if the language is not clear, it is for the legislature, and not for the Courts, to remedy an apparent defect. If that case stood alone we might have thought it right to follow it without expressing our own opinion upon the question on the ground that uniformity in the decisions of the High Courts on the Income-tax Act is desirable. But the case has been dissented from by the High Court of Rangoon in the case of *V. E. A. Chettyar Firm* v. *Commissioner of Income-tax* and in my opinion the decision of the High Court of Rangoon is to be preferred to the decision of the High Court of Madras. It seems to me that the language of Section 66 is clear, and that we cannot extract from it an obligation on the Commissioner to state a case dealt with under Section 33.

The Commissioner, in refusing to state a case, stated in his letter of May 1, 1933, that a reference to the High Court under Section 66 (1) can only be made in the course of any assessment or any proceeding in connexion therewith and not after the case has been finally decided, and he expressed the view that the case having been decided, nothing could now be done in the matter. With all respect to the learned Commissioner I think that the reason he has given for not stating the case cannot be supported. It is, I think, clear from the affidavit of the petitioners that a question of law does arise, and that that question arose in the course of the assessment proceedings; that being so, I think the learned Commissioner has a discretion to state a case under Section 66 (1). I will only say that if this Court had any discretion in the matter we should think it right to exercise it by directing the learned Commisssioner to state a case. However, in my view the Court has no discretion in the matter. We must therefore dismiss the petition. Petition dismissed with costs as on the original side scale.

BLACKWELL, J.—I agree. In my opinion the Madras decision in *Abdul Kader Marakayar & Co., In re*, was wrong. With all respect to the learned Judges who were parties to that judgment it seems to me impossible to hold that the Privy Council decision on which they relied can still apply to the new Section 66, sub-section (1), of the Act of 1922. The legislature when that Act was framed must have had present to their minds the old Section 51 of the 1918 Act on which their Lordships of the Privy Council based their decision. But there was nothing in Section 51 which corresponds to the powers conferred upon the High Court in sub-section (3), Section 66, and in my opinion having regard to the fact that in the new Section 66 express powers are conferred upon the High Court in sub-section (3) and no such powers are conferred under or in relation to sub-section (1), it must be taken to have been the intention of the legislature not to empower the High Court to compel the Commissioner to state a case when he purported to act under sub-section (1) of that section. I appreciate the difficulties which were pointed out by the learned Judges of the Madras High Court, namely, that it might be open to the Commissioner to call for the records under Section 33 and burke any further

inquiry. That was pointed out also in the Rangoon decision, *V.E.A. Chettiar Firm* v. *Commissioner of Income-tax.* But as the learned Judges said in that case, that is really a matter for the legislature. As the section stands, in my opinion, the decision of the Rangoon High Court is clearly right, and there is no power whatever in the High Court to order the Commissioner under Section 45, Specific Relief Act, to state a case. It is not clearly incumbent upon him to do so under Section 66 (1). On the contrary there is no provision in that behalf at all, but merely a discretionary power which is thereby vested in him. In my opinion therefore this petition must be dismissed.

Order accordingly.

[IN THE PATNA HIGH COURT.]

COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA

v.

SIR KAMESHWAR SINGH (MAHARAJA OF DARBHANGA.)

Courtney-Terrell, C. J., Kulwant Sahay and James, JJ.

December 21, 1933.

INCOME TAX—' AGRICULTURAL INCOME '—MORTGAGE AND *Thica* LEASE TO MORTGAGEE—PROFITS RECEIVED BY MORTGAGEE —WHETHER INTEREST OR RENT—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 2 (1) (a).

The assessee who carried on money-lending business on a large scale advanced 18½ lacs of rupees to the proprietor of an estate on the security of certain properties under a deed which was described as ' zarpeshgi *lease with usufructuary mortgage.' Out of the annual income of the properties, namely, Rs. 1,59,813, a sum of Rs. 37,530 was set off for expenses. A further sum of Rs. 31,000 called* thica *rent was reserved for the lessor mortgagor but was to be appropriated by the assessee towards the principal of the loan. The balance of the yearly income, namely, Rs. 91283,*

called thica *profits was to be taken by the assessee. The income-tax authorities levied assessment on the sum of Rs. 91,283 on the ground that it represented interest on the loan. The assessee contended that it was agricultural income. On a reference by the Commissioner*: Held, *that the income assessed was rent derived from land used for agricultural purposes falling within the definition of agricultural income and was exempt from assessment.*

Courtney Terrell, C. J.—*The source of the income must be considered in its proximate rather than in its ultimate significance and the income-tax authorities are not concerned with the intention of the assessee in making the investment.*

Kulwant Sahay, J.—*If income is derived from land used for agricultural purposes as rent or revenue, then such income is exempt from assessment. The income cannot be made taxable unless and until it can be brought within the letter of the law.*

Case stated by the Commissioner of Income Tax, Bihar and Orissa, under Section 66 (2) of the Indian Income Tax Act (XI of 1922). [Mis. Judicial Case No. 99 of 1932.]

STATEMENT OF CASE.

" This is a statement of a case under Section 66 (2) of the Indian Income Tax Act (Act XI of 1922 on a question of law arising out of the assessment made in the year 1930-31 on the Maharajadhiraja of Darbhanga (hereinafter called ' the assessee'). The year of account in this case is the 12 months running from 1st October, 1928, to the 30th September, 1929, and the Income Tax Officer made an assessment on the assessee on a total income of Rs. 21,34,916 which amount the Assistant Commissioner reduced on appeal to Rs. 16,80,037.

2. In that assessment the Income Tax Officer took into consideration as taxable income a sum of Rs. 97,283, as the profits in the year of account arising from a loan transaction into which the assessee had entered on 3rd February, 1929, with the owner of the Lachhimpur Estate which lies partly in Bhagalpur district and partly in the neighbouring district of the Santal Parganas which is a non-Regulated district.

3. This estate was at one time the property of one Pratab Narain Singh, but on his death in 1913 it passed to his eldest widow Thakurain Kusum Kumari by virtue of a will. In the

time of Pratab Narain, there were substantial outstanding debts and decrees against the estate aggregating about 15 lacs of rupees and the creditors began to take steps to execute these decrees and satisfy these debts by the sale of the estate. In the meantime another widow of Pratab Narain filed an administration suit against the executrix praying for the appointment of a receiver. This suit ultimately came before the Patna High Court which granted permission to the Thakurain to take a loan of 18½ lacs from the assessee on the following conditions amongst others. The estate situated in the Bhagalpur district was expressly given as security for the loan, while the Santal Perganas property was given in *thica* or lease to the assessee, this arrangement being necessary because the Santal Perganas property was a *ghatwali* estate or tenure and the creation of an encumbrance on it might give rise to legal difficulties. Consequently two bonds were executed one in respect of the Lachhimpur Estate in Bhagalpur and the other in respect of the Santal Perganas property, the former lease of indenture being called "*Zarpeshgi* lease with usufructuary mortgage" and the latter a *thica* or indenture of lease. Both bonds, a copy of each of which is attached with the statement of case, were executed on 3rd February, 1929, and the arrangements thus made and conditions set out in the two bonds were approved by the High Court.

4. In the case of the Bhagalpur property the yearly income was calculated as Rs. 1,59,813 and from this the following expenses were set off in the first instance.

[NOTE.—There is an error of Rs. 6,000 somewhere. But this error is repeated from the copy of the deed itself which is on the file.

(Sd.) W.J.]

	Rs.	A.	P.
Unrealisable rent and cesses calculated at 5 per cent. on the current demand.	7,590	11	0
Establishment and management charges ...	19,977	0	0
Irrigation expenses ...	5,000	0	0
Head office expenses and travelling expenses of the officers ...	1,000	0	0
Law expenses (exclusive of title or mortgage suits) ...	3,000	0	0
Contingent miscellaneous expenses ...	962	7	0
Total ...	37,530	2	0

The balance was distributed as follows :—

		Rs.	A.	P.
Thica profits	....	91,283	0	0
Thica rent	....	31,000	0	0

The *thica* profit of Rs. 91,283 represented the annual profits to the assessee arising out of the transaction, while the Rs. 31,000 referred to above called in the indenture "*Thica* rent" was to be reserved for the proprietress Thakurain, described as the lessor mortgagor. The *thica* rent, though reserved for the lessor mortgagor, was not to be hers but was to be appropriated by the assessee along with certain other receipts from the estate towards the satisfaction of the principal of the loan subject to a maximum payment towards this object of Rs. 1,20,000 a year. Further, as the principal of the loan would, in this way, be reduced from year to year by these appropriations the *thica* profits were to be reduced by 6 per cent. every year and if the whole of the principal was not paid off at the end of 15 years, this arrangement was to continue and to be extended till the whole loan was satisfied.

5. The bond in respect of the Santal Perganas is called an indenture of lease and in this case the *thica* rent fixed at Rs. 30,000 was to be appropriated as follows :—

(1) Rupees 9,000 to be paid to the junior Thakurains as maintenance allowance due to them from the whole Lachhimpur properties.

(2) Rupees 2,400 as subscription to schools and dispensaries in the whole estate.

(3) Rupees 1,800 for customary *pujas*.

(4) Sum unspecified towards arrears of public demands.

(5) Balance towards liquidation of the *Zarpeshgi* loan on the Bhagalpur properties.

Provision is also made in the Santal Perganas bond for payment of the Government revenue due from both the Bhagalpur and the Sental Perganas properties in respect of which no provision was made in the indenture relating to the Bhagalpur properties and also for the payment of income-tax which may be payable on the *sairat* income of both the estates.

6. The Income-tax Officer held, and the Assistant Commissioner accepted the view, that, although both bonds have scrupulously avoided mention of the word "interest" on the loan of 18½ lacs the "*Thica* profits" of Rs. 91,283 mentioned in the Bhagalpur bond was nothing more or less than interest on that loan. Any excess that is realised over the principal or capital lent is called interest and in this case the *thica* profit referred to in the Bhagalpur indenture is that excess.

7. The assessee's profit arising from this loan in the year of account was Rs. 91,283 reduced or increased according to whether the actual expenses of collection were more or less than the amount set out in the calculation noted in paragraph 4 above and the question at issue is whether or not this profit is assessable to income-tax.

8. The assessee has admittedly a business in money-lending and this profit is taxable under Section 6 (iv) of the Act (charging section) unless it is held to be exempt under Section 4 (3) (viii) as agricultural income and these profits will be exempt as agricultural income if it is held that they are rent or revenue derived from land used for agricultural purposes and either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such [Section 2 (1) of the Act].

9. Connected with the general question, which I have stated above and on which your Lordships' decision is invited, is the further question whether the 1st indenture is or is not a pure usufructuary mortgage.

10. The Act requires that I should state my opinion on the question formulated and my opinion is that in the first place this indenture is not a pure usufructuary mortgage and secondly, whether it is or not, the income resulting from the transaction described above is taxable as it is not agricultural income within the definition of the Act.

11. In the indenture regarding the Bhagalpur properties the transaction is described as a *Zarpeshgi* lease with usufructuary mortgage.

12. Usufructuary mortgage is defined in Section 58 (*d*) of the Transfer of Property Act as follows :—"Where the mortgagor

delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money, and to receive the rent and profits accruing from the property, or any part of such rents and profits, and to appropriate the same in lieu of interest or in payment of mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called a usufructuary mortgage, and the mortgagee a usufructuary mortgagee. A *Zarpeshgi* lease is distinguishable from a loan in that while a mortgage is a security for the payment of money or for the performance of the engagement, a lease as such, whatever its character, always implies a grant of land for a fixed term free of rent (Law of Transfer in British India by Gour, VI edition, Vol. II, p. 876). Again, I quote from Mitra's Transfer of Property Act, V edition p. 326: "In a *zarpeshgi* lease properly so-called, there is an advance to the lessor in consideration of which the lessee is given possession of the land for a term during which he recoups himself for the sum advanced and interest out of the profits of the land of which he is put in possession. There is no question of redemption upon paying off an advance. The lease terminates at the expiration of the term and the lessor may thereafter re-enter."

13. In the indenture regarding the Bhagalpur properties the transaction is described as a "*Zarpeshgi* lease with usufructuary mortgage." The Income-tax Officer held that this was not a genuine *zarpeshgi* but that for purposes of security it was a *thica* or lease for the management of the estate and that although the assessee is in possession of the estate he is in possession only as a manager. The Income-tax Officer advanced the following reasons for the view that the transaction was not a genuine usufructuary mortgage:—

Firstly, there is no mention, at any rate in so many words of the usufruct of the property mortgaged being utilized in satisfaction of interest as required by section 58 (*d*) of the Transfer of Property Act.

Secondly, the expression "*thica* rent" and "*thica* profits" have been used and this agreement therefore, if anything, is a *thica* or lease and not a usufructuary mortgage.

Thirdly, it is not a genuine *thica* because (*a*) no *salami* has been paid to be retained by the debtor and the whole amount of loan is returnable, and (*b*) the amount of *thica* profits is out of all proportion to the income of the estate.

The Income-tax Officer's contention is that by reason of the lease the assessee is in possession of the estate as manager, while the mortgage is not a usufructuary mortgage but an instrument for securing the loan. In other words, the assessee is in reality a mortgagee but not not a mortgagee in possession because although he is in possession of the property, he is in possession only as a manager of the property and not as mortgagee.

14. It is argued by the appellant that there is nothing in the indenture to warrant the above conclusions and it is contended that the transaction can be taken either as *thica* lease or as a usufructuary mortgage but in neither case is the profit assessable because the profits are agricultural income. The assessee, however, takes his stand on the position that the transaction is in reality a usufructuary mortgage because it fulfils all the conditions of a usufructuary mortgage as defined above. In other words, it is argued that there is a loan, there is security of the property for the loan, there is possession of the property and the loan is being liquidated out of the usufruct of the property until the loan is satisfied, and merely because the words "*thica* rent" and "*thica* profits" are used in the indenture for the purpose of allocating the usufruct, it cannot be held that the transaction is not a usufructuary mortgage.

15. While the transaction shown in the first indenture may have in many respects the appearance of a usufructuary mortgage there are certain special circumstances which, I think, enable one to differentiate it from this type of indenture.

Firstly, the loan of 18½ lacs is secured not by one transaction but by two and, in my view, these two transactions must be taken together and it is impossible to regard the 2nd transaction or *thica* lease of the Santal Perganas property as anything but a part of the first transaction. The assessee would not have advanced the loan of 18½ lacs to the debtor merely on the usufructuary mortgage of the Bhagalpur property. The second indenture was executed at the same time. The loan was the

consideration for the *thica* and the *thica* makes provision to meet the demands by Government on the property covered by the first indenture and essentially it is a part of the transaction and this *thica* is an additional security for the loan. Again, the whole income of the estate mortgaged is not technically retained by the assesse-mortgagee, because there is a provision in the first indenture that Rs. 31,000, the *thica* rent, as well as certain other realisations were payable to the mortgagor. In Gour's *Law of Transfer*, 5th Edition, Volume II, page 988 it is stated :—

"If the mortgagee is to appropriate only a portion of the usufruct, as where he had agreed to pay over the balance of the profits, if any, left over after paying himself the interest due on the loan the transaction is not an usufructuary but a simple mortgage."

It may be true that in this case the *thica* rent and certain other receipts are only nominally reserved for the mortgagor and are actually appropriated by the mortgagee towards payment of the principal but this appropriation is a distinct and separate contract which is independent of the mortgage, though it may arise out of it.

16. It was then argued that whether the transaction is a usufructuary mortgage or a *thica* lease or neither does not affect the case, for the profits of this transaction are exempt not because they are the profits arising from a usufructuary mortgage but because they are "agricultural income". It is contended that the profits accruing to the assessee on this transaction are received out of rent or revenue derived from land used for agricultural purposes, that the assessee is the landlord for the time being by virtue of this instrument and his name is entered in the Collector's register as such and the profits of the transaction are therefore agricultural income. The answer to this argument would appear to be that although the assessee may be shown in the Collector's register, he can be shown only as a mortgagee in possession and the fact that his name is entered in the Collector's register does not prove that the profits are agricultural income.

17. To put the case at its lowest, there is room for considerable doubt whether interest on money-lending which is otherwise assessable is exempt from taxation merely because it is

realised in the form of rent from the tenants of the debtor and in my view the words 'rent or revenue derived from land used for agricultural purposes' in Section 2 (1) (a) of the Act can only refer to 'rent or revenue derived by the recipient as proprietor or landlord' and not as mortgagee or a person holding the land as security from the landlord. In the latter case the mortgagee realises the rent on behalf of the mortgagor who is the landlord. It is true that the words "as proprietor" or "as landlord" do not occur in the definition but it is respectfully submitted that this transaction should be interpreted as I have interpreted it. In other words, the usufructuary mortgagee realises from the tenant what is rent to the mortgagor, but interest to himself.

18. I take the analogous case of a landlord who had been employing a manager of his estate on a fixed monthly salary, but finding himself short of cash and unable to meet the manager's salary authorized the manager to collect the rent from a number of villages in his estate by way of satisfaction of his salary dues. Surely, it could not be said that the sums thus collected by the manager by way of salary are exempt from tax because the manager has collected them directly and appropriated them himself. But the case here, it seems to me, is even stronger if the view that in these circumstances the mortgagee is realising rent on behalf of the mortgagor and reimbursing himself for the interest due from the mortgagor out of the proceeds is correct, for in that case the position of the mortgagee would be analogous to the position of a manager who realises rent on behalf of the employer and pays his salary out of the realisations and in these circumstances it has never been argued that the manager's salary is not taxable as being agricultural income.

19. My opinion therefore is that the first indenture referred is not a pure usufructuary mortgage and that even if it is, the profits derived from the transaction are legally taxable.

20. That your Lordships are prepared to consider the view that the income arising from a pure usufructuary mortgage may very well be taxable income is apparent from the observation of Das, J., in his judgment in the case *Rajniti Prasad*

Singh v. *Commissioner of Income-tax, Bihar and Orissa,* 4 I.T.C. at p. 276.

"On the other hand it may be urged with equal force that a mortgage does not cease to be a mortgage because possession is delivered to the mortgagee and that the essence of a mortgage simple or usufructuary is that a loan is advanced and a security given for the due repayment of that loan and that the income derivable by the mortgagee whether in possession or not is interest on the money advanced and is the return from money not rents, issues and profits from the lands mortgaged and therefore not a return from the land. As I have said the question is a difficult one upon which much may be said on either side." Again, the learned Chief Justice observed as follows: "It is contended on the strength of two earlier decisions to be hereinafter referred to that the income of a usufructuary mortgagee as such is agricultural income and exempt from tax. As I shall point out, having regard to the facts of the case this broad question does not arise and in spite of the weight of opinion in favour of a negative answer I would reserve my own view on the subject." And again at page 274 *idem* "I would answer the question propounded to a limited extent by stating that in the opinion of the court the interest reserved by the documents in this case and paid to the assessee during such period as he is in possession of the leased property is assessable to income-tax leaving it open for future discussion as to whether the income of a usufructuary mortgagee is so assessable and whether if the mortgagee lessor enters into possession, the usufruct will be assessable."

The Advocate-General and *Mr. Manohar Lal,* for the Commissioner.

Sir Sultan Ahmad, Messrs. K.P. Jayaswal, P. R. Das, S.M. Gupta, Murari Prasad, Sudhir K. Basu, R. Misra, B.P. Sinha, C. S. Jayaswal and *K. P. Upadhaya,* for the assessee.

COURTNEY-TERRELL, C. J.—The question for decision in this case is whether an item in the assessee's income for the year from October 1, 1928, to September 30, 1929, is properly to be considered as 'rent or revenue derived from land used for agricultural purposes' under Section 2, sub-section (1) (a), of the Act and so exempt from taxation.

The assessee has a large money-lending business. On March 3, 1929, he entered into a business transaction with the proprietors of the Lachimpur estate. The Lachimpur estate comprises two properties, one in Bhagalpur and the other in the Santal Parganas. By the law of the Santal Parganas the latter property could not be mortgaged.

The proprietors wished to take a loan of 18½ lacs from the assessee and the bargain is contained in two bonds, the one relating to the Bhagalpur property and the other in respect of the Santal Parganas property. The first is a *zarpeshgi* lease with a usufructuary mortgage and the latter is a *thica* lease. They are interdependent and each makes reference to the other. In the case of the Bhagalpur bond the yearly income of the property mortgaged was calculated as Rs. 1,59,813. A sum for expenses was set off amounting to Rs. 37,530. A further sum of Rs. 31,000 called the "*thica* rent" was reserved for the lessor mortgagor but it was not to be paid direct to her but was to be appropriated by the assessee towards the principal of the loan and in addition there was a provision that the principal of the loan might be reduced by annual payments not to exceed Rs. 1,20,000 in any year. The balance of the yearly income from the property was called the '*thica* profits' and amounted to Rs. 91,283. If at the end of 15 years the whole of the principal had been paid off the estate was to be handed back to the lessor mortgagor; otherwise it was to continue until the whole loan was satisfied.

In the case of the Santal Parganas property, the lease provided for a rent of Rs. 30,000 to be paid by the assessee out of which a certain sum was to be paid to the lessor for maintenance and certain other sums for subscriptions for schools, *pujas* and the like, and the balance was to go towards the payment of the loan provided for in the *zarpeshgi* bond. The mortgagee lessee was to be in possession of both properties, and in his relation to the cultivators of the soil he stood in the position of landlord dealing directly with them and collecting the rents. He had moreover to pay the Government Revenue, cesses and taxes and his name was registered in the Land Registration Department. He alone was able to sue for rent whether current or arrears, to sue for enhancement or for ejectment and was able to settle lands with *raiyats* and tenants in all the properties; in

fact he was in a position to take all proceedings which the mortgagor would have been able to take in the ordinary course if the lands leased and mortgaged had remained in her *khas* possession.

The question which arises for our decision relates to the sum of Rs. 91,283, the balance of the income from the Bhagalpur property after paying the *thica* rent and the expenses of working the estate.

The contention on behalf of the Department is that this is not agricultural income. It is argued firstly, that the possession by the assessee of the estate and the collection of the Revenue was merely incidental to his business position as a money-lender and that the "source" of the income as contemplated by Section 4 was in truth the money-lending business. Secondly, it is contended that the assessee's position in any case was of a dual character. In his capacity as a lessee in possession of the property he was merely an agent for the purpose of collecting such revenue and paying it to himself in his capacity as a mortgagee.

On the part of the assessee it is contended that the source of the income must be considered as the rent and other payments derived from the tenants of what is admittedly land used for agricultural purposes. In my opinion the latter argument must prevail. The source of the income must be considered in its proximate rather that in its ultimate significance. The estate was in every sense in the possession of a landlord of land used for agricultural purposes. We are not concerned with the intention of the assessee in making this investment. It is conceivable that he may have intended ultimately to purchase the mortgaged property in order to add it to the rest of his *zamindari* rather than to obtain the repayment of his loan in the ordinary way. To accede to the suggestion that we should look at the ultimate rather than the proximate source of the income would involve insuperable difficulties. It is perfectly clear that if the mortgage had been a simple mortgage and the mortgagor had remained in possession and paid this sum by way of interest to the mortgagee, it would then have been taxable by way of income arising out of the transaction. The assessee would have derived the income not from the land but

from the mortgagor. Similarly if the assessee under a contract of usufructuary mortgage had leased the land back to the mortgagor so that the latter remained in possession and in relation to the cultivators of the soil stood in the position of a landlord, the rent payable by the mortgagor would merely have been by way of interest payable to the assessee and would have been taxable. We are dealing with a fiscal statute and accordingly are not concerned either with the intention of the legislature or with the spirit of the legislation. In such cases the Court has merely to regard the letter of the law unless such considerations are clearly specified in the enactment for the guidance of tribunals. In this case there are no such guiding principles stated and we have to follow the enactment strictly.

A great part of the Commissioner's statement of the case is taken up with a discussion on the question of whether or not the transaction in question is or is not a usufructuary mortgage and we have been invited to express an opinion on this question apparently with a view to the possible consequences which might be argued from the conclusion. But the real question for decision is whether the profit of Rs. 91,283 is or is not assessable to income-tax and I would answer this question in the negative.

The assessee is successful and is entitled to costs which we fix at Rs. 200 in addition to the amount deposited by him which must be returned.

KULWANT SAHAY, J.—I entirely agree.

Two questions have been referred to us under Section 66 (2) of the Indian Income Tax Act. The first question is whether the assessee's profit arising from the transaction of the usufructuary mortgage and *Zarpeshgi* lease evidenced by the deed relating to the Bhagalpur property amounting to Rs. 91,283 is assessable to income-tax; and the second question propounded is whether the indenture relating to the Bhagalpur property is or is not a pure usufructuary mortgage. As regards the second question, it appears that no answer is necessary. The Department seems to be under the impression that the income derived from usufructuary mortgage is not taxable but if the transaction

be treated as being other than usufructuary mortgage the income derived would be taxable. In my opinion the question whether the income is or is not taxable does not depend upon the transaction being a usufructuary mortgage or otherwise. The question for consideration is whether the income derived by the assessee from the transaction in question is or is not an agricultural income under Section 2, sub-section (1) (*a*), of the Indian Income Tax Act. If it is such agricultural income there can be no doubt that it is not taxable. The principal question, therefore, is the first question which depends on a finding whether the income is or is not agricultural income.

It has been contended on behalf of the Department that the source of the income is the transaction of the loan of Rs. 18½ lacs and it does not matter whether the income is derived from lands used for agricultural purposes or otherwise. In my opinion this contention is not sound. If the income is derived from land used for agricultural purposes as rent or revenue, then such income is exempt from assessment. The income cannot be made taxable unless and until it can be brought strictly within the letter of the law and a fiscal statute must be construed strictly in favour of the subject. After consideration of the document in question and the circumstances of the case I am clearly of opinion that the income in question is exempt from taxation as being rent or revenue derived from land used for agricultural purposes. The assessee is in the position of landlord with respect to the actual cultivating tenants within the meaning of the term under the Bengal Tenancy Act and the income derived from the lands must be agricultural income within the meaning of the Act and is, therefore, exempt from taxation.

JAMES, J.—I agree.

Order accordingly.

[IN THE RANGOON HIGH COURT.]

COMMISSIONER OF INCOME TAX, BURMA

v.

BENGALEE URBAN CO-OPERATIVE CREDIT SOCIETY LTD.

Page, C. J., Das and Mya Bu, JJ.

July 13, 1933.

INCOME TAX—CO-OPERATIVE SOCIETY—INTEREST FROM SECURITIES AND INCOME FROM PROPERTY—WHETHER EXEMPT FROM INCOME TAX—NOTIFICATION DATED AUGUST 25, 1925—'PROFITS' MEANING OF—BURDEN OF PROOF OF EXEMPTION.

'Income' as contrasted with 'profits' or 'gains' in the Income Tax Act means a periodical monetary return 'coming in' and accruing to the assessee independently and not as the net proceeds of a business carried on by the assessee. 'Profits,' on the other hand, are the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those profits.

The term 'profits' in the notification of the Government of India of August 25, 1925 (which exempts the profits of co-operative societies from income-tax), is used in the latter sense and prima facie, *therefore, neither interest from securities nor income derived from property are profits within the meaning of that term as used in the notification.*

Investment of capital in securities or property may, however, be part of the business of the society and the question whether income from such investments is profits of a business carried on by the society is a question that depends on the circumstances of each case ; and in considering that question the fact that such income appears as part of the profits in the profit and loss account of the society is not conclusive.

The burden is upon the assessee to prove that the income for which the society claims exemption is 'profits' within the meaning of the notification.

Cases referred to :

ALIANZA CO., LTD. *v.* BELL [1904] (2 K.B. 666).

Board of Revenue *v.* Mylapore Hindu Permanent Fund [1923] (47 Mad. 1; A.I.R. 1923 Mad. 684; 76 I.C. 833 (S.B.)).

Carlisle and Silloth Golf Club *v.* Smith [1913] (3 K.B. 75).

Commissioner of Income Tax *v.* National Mutual Life Association of Australasia [1931] (55 Bom. 637; A.I.R. 1931 Bom. 448; 134 I.C. 555).

Commissioner of Income Tax, Bengal *v.* Shaw Wallace & Co. [1932] (59 Cal. 1343; A.I.R. 1932 P.C. 138; 59 I.A. 206; 136 I.C. 742).

Coltness Iron Co. *v.* Black [1880] (6 A.C. 315).

Gresham Life Assurance Society *v.* Styles [1892] (A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479; 41 W.R. 270; 56 J.P. 709).

Income Tax Commissioners *v.* Pemsel [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805).

Liverpool and London and Globe Insurance Co. *v.* Bennett [1911] (2 K.B. 577).

Madras Central Urban Bank, Ltd. *v.* Commissioner of Income Tax [1929] (52 Mad. 640; A.I.R. 1929 Mad. 387; 118 I.C. 107).

Madras Provincial Co-operative Bank, Ltd. *v.* Commissioner of Income Tax, Madras [1933] (56 Mad. 837; 144 I.C. 422; 64 M.L.J. 640; 1933 I.T.R. 158).

New York Life Assurance Co. *v.* Styles [1889] (14 A.C. 381).

Naval Colliery Co. Ltd. *v.* Commissioners of Income Tax [1928] (12 Tax Cas. 1017).

Norwich Union Fire Insurance *v.* Magee [1896] (73 L.T. 733: 44 W.R. 384).

Russell *v.* Town and County Bank [1883] (2 Tax Cas. 321).

United Service Club *v.* Emperor [1921] (A.I.R. 1921 Lah. 208; 61 I.C. 886; 2 Lah. 109).

A. Eggar, for the Crown.

Foucar, for the Assessee.

PAGE, C. J.—The question propounded is:

"What portion of the income of the society shown in its assessment order for 1932-33 is exempt from income-tax by virtue of the notification of the Government of India, dated 25th August, 1925."

Under the notification the Governor-General in Council directed that the following class of income shall be exempt from the tax payable under the said Act, namely—
the profits of any co-operative society other than the Sanikatta Salt Owners' Society in the Bombay Presidency for the time being registered under the Co-operative Societies Act, 1912 (II of 1912), the Bombay Co-operative Societies Act, 1925 (Bombay Act VII of 1925), or the Burma Co-operative Societies Act, 1927 (Burma Act VI of 1927), or the dividends or other payments received by the members of any such society on account of profits."

The Income Tax Officer determined the assessee's total income for the year of assessment 1932-33 to be as follows:

I. Income from Securities—

	Rs. A. P.	Rs. A. P.	Rs. A. P.
Tax Free	135 0 0		
Taxed (gross)	278 0 0		
			413 0 0

II. Income from Property—

	Rs. A. P.	Rs. A. P.	Rs. A. P.
Total Rents	6,875 0 0		
Service taxes	851 0 0		
Annual value	6,024 0 0		
Less 1/6th of Annual value	1,006 0 0		
Insurance	134 0 0		
Ground rents....	336 0 0		
Collection charges 6 per cent.	360 0 0		
Vacancies	440 0 0		
	2,276 0 0		3,748 0 0

	Rs. A. P.	Rs. A. P.	Rs. A. P.
III. Profits of Co-operative Credit Society—			
Net profits as per accounts	13,162 10 2		
Deduct—Previous year's Profit	48 5 10		
Interest on securities	337 14 0		
Interest in Post Office Savings Bank Account	12 13 5		
Interest on Bank deposits	834 12 9		
Net receipts of house rents	4,364 0 0		
House-rents accrued....	436 0 0		
	6,023 14 0		
		7,138 12 2	
Add—Depreciation on safe	36 0 0		
Depreciation reserve for houses	700 0 0		
Expenses for collecting rents	726 0 0		
	1462 0 0		
		8,600 12 2	
Deduct—Honoraria to Secretary, etc.	1,960 0 0		
		6,640 0 0	

	Rs. A. P.	Rs. A. P.	Rs. A. P.
Profits of Co-operative Credit Society, in whole rupees ...	....	....	6,641 0 0
			10,802 0 0
IV. Income from other sources:			
Bank interest	....	....	835 0 0
	Total income	....	11,637 0 0

Income-tax was assessed upon heads I, II and IV, of the assessee's income upon the ground that such income was not part of the "profits" of the assessee exempted from income-tax under the notification of 25th August, 1925. Now it appears to me that the intention of the Governor-General in Council was to exempt from income-tax under the notification the profits accruing to co-operative societies from carrying on the business of a mutual co-operative society, upon the ground that "a man cannot make a loss or profit out of himself," per Buckley, L.J., in *Carlisle and Silloth Golf Club* v. *Smith*: see also *Gresham Life Assurance Society* v. *Styles*, *New York Life Assurance Company* v. *Styles*, *United Service Club, Simla* v. *Emperor* and *Board of Revenue* v. *Mylapore Hindu Permanent Fund*, and in this way to encourage and foster co-operative societies which were brought into being as the result of a movement to improve the conditions under which cultivators of the land in India and Burma lived and worked. Mutual co-operative undertakings have always been held liable to pay income-tax upon income derived from investments and house property: see *New York Life Assurance Co.* v. *Styles*, *United Service Club, Simla* v. *Emperor* and *Commissioner of Income-tax* v. *National Mutual Life Association of Australasia*. Moreover, the Governor-General in Council while the notification of 1925 was under consideration must have been aware that before the year 1925 it

had been the practice of the income-tax authorities to assess and levy income-tax upon the income of co-operative societies derived from interest on securities (see Income Tax Manual, 1923, p. 77, and Income Tax Manual, 1932, p. 146) and as Lord Macnaghten observed in connexion with the Income Tax Act in England:

"I cannot help reminding your Lordships, in conclusion, that the Income Tax Act is not a statute, which was passed once for all. It has expired, and been revived, and re-enacted over and over again; every revival and re-enactment is a new Act. It is impossible to suppose that on every occasion the legislature can have been ignorant of the manner in which the tax was being administered by a department of the State under the guidance of their legal advisers, especially when the practice was fully laid before Parliament in the correspondence to which I have referred. It seems to me that an argument in favour of the respondent might have been founded on this view of the case. The point, of course, is not that a continuous practice following legislation interprets the mind of the legislature, but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive re-enactment": *Income Tax Commissioners* v. *Pemsel* and *Madras Provincial Co-operative Bank, Ltd.* v. *Commissioner of Income Tax, Madras.*

It is urged that the assessee society has not previously been assessed upon the income it has received from investments or house property, but in considering what was the intention of the legislature when it issued the notification in question that fact does not appear to me to be of importance. The main contention on behalf of the assessee is that what matters is not what the Governor-General in Council intended but what he did; that "income," "profits" and "gains" as used in the Income Tax Act are synonymous terms, and that the whole of the society's income is exempt from income-tax under the notification. In support of his argument the learned advocate for the assessee

cited the following passage from the judgment of the Judicial Committee of the Privy Council in *Commissioner of Income Tax, Bengal* v. *Shaw Wallace & Co.* at p. 1350 (of 59 Cal.):

"The object of the Indian Act is to tax "income," a term which it does not define. It is expanded, no doubt, into "income, profits and gains," but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act, connotes a periodical monetary return "coming in" with some sort of regularity or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field."

Now, in that case the Judicial Committee were considering the meaning of "income" as contrasted with "capital," and no doubt as income-tax is a tax upon income, in the wide sense of the term, "income" when contrasted with "capital" means and includes not only income in its strict meaning, but also profits and gains. But, in my opinion, it is not true to say that in the strict meaning of those terms as appears from an examination of the various sections of the Income Tax Act "income" is used in the same sense as "profits" or "gains." In Section 6 six heads of income, profits and gains are made chargeable to income-tax as therein provided, head (ii) being "interest on securities," (iii) "property," (iv) "business," and under Section 10 income-tax is "payable by an assessee under the head "business" in respect of the profits and gains of any business carried on by him," whereas the tax upon "interest on securities" is payable under Section 8 and upon "property" under Section 9. In my opinion, "income" as contrasted, not with capital, but with "profits" or "gains" in the Income Tax Act means "a periodical monetary return 'coming in'" and accruing to the assessee independently, and not as the net proceeds of a business carried on by the assessee as defined in Section 2 (4) of the Act. "Income" in this sense connotes incomings without regard to outgoings. On the other hand "profits" in this connexion are:

"the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts: per Lord Herschell in *Russell* v. *Town and County Bank*, *Alianza Co., Ltd.* v. *Bell* and *Naval Colliery Co., Ltd.* v. *Commissioners of Income Tax*."

In my opinion, the term "profits" in the notification of 25th August, 1925, is used in this latter sense, and *prima facie* therefore neither interest from securities nor income derived from property are "profits" within the meaning of that term as used in the notification. The learned Government Advocate on behalf of the Commissioner of Income-tax contended that as the income derived from investments and from property is classed and chargeable under separate heads of income in S. 6 of the Act, it is *nihil ad rem* that such income may also in the circumstances of any particular case fall within the head "business," for such income, being chargeable as "interest on securities" or as "property," is not to be regarded or treated as "profits," but as "income" in the strict meaning of those terms, and therefore is outside the ambit of the notification. I am not able to accept this contention. It may be that the investment of capital in property or securities is part of the business of an assessee, and in such a case, in my opinion, the net income accruing from such investments would be, and be chargeable as profits of the business. Whether such investments are profits of a business carried on by an assessee, in my opinion, is a question that depends upon the circumstances of each case, and in considering that question the fact that such income appears as part of the profits in the profit and loss account of the assessee is not conclusive: *Coltness Iron Co.* v. *Black* and *Naval Colliery Co.* v. *Commissioners of Income Tax*.

In the present case where the assessee is claiming an exemption from income-tax in respect of income that *prima facie* is chargeable to income-tax, the onus, of course, lies upon the assessee to prove that the income for which the society claims exemption is "profits" within the notification: *Madras Central Urban Bank, Ltd.* v. *Commissioner of Income Tax*, *Madras Provincial Co-operative Bank, Ltd.* v. *Commissioner of Income Tax*, *Norwich Union Fire Insurance* v. *Magee* and *Liverpool and London and Globe Insurance Co.* v. *Bennett*.

Neither the income-tax authorities nor the assessee appear to us to have approached the consideration of the case from the right point of view, the Commissioner of Income-tax relying upon the classification of heads of income under Section 6, the assessee upon the contention that the words "income," "profits" and "gains" in the Income-tax Act bear the same meaning. The income-tax authorities, upon such material as is or may be placed before them, must now determine whether or not the income accruing to the society under items I, II and or IV forms part of the profits of the business carried on by the society. That question, in our opinion, has not yet been fully ventilated, and after determining it the assessment will be made in accordance with the construction that the Court has put upon the term "profits" as used in the notification. I would answer the question propounded in this sense.

DAS, J.—I agree.

MYA BU, J.—I agree. *Reference answered.*

[IN THE ALLAHABAD HIGH COURT.]

JOT RAM SHER SINGH

v.

COMMISSIONER OF INCOME-TAX, UNITED PROVINCES.

Niamatullah and Bennet, JJ.

January 11, 1934.

INCOME-TAX—BEST JUDGMENT ASSESSMENT—POWER OF HIGH COURT TO REQUIRE COMMISSIONER TO STATE CASE—INCOME TAX ACT (XI OF 1922), SECTIONS 23 (4), 30 (1), 31, 66 (3).

An order passed by the Assistant Commissioner rejecting an appeal from an order under Section 23 (4) making a best judgment assessment, on the ground that no appeal lay to him in view of the proviso to Section 30, Clause (1), of the Income Tax Act, is an order under Section 30 (1) and not an order under Section 31 of the Act and the High Court has consequently no power to require the Commissioner under Section 66 (3) of the Act to state

a case on questions of law arising out of an assessment under Section 23 (4). Dicta : *As the law stands the assessee has to be content in such cases with such relief as the Commissioner may give him in exercise of his revisional powers under Section 33. It is also open to the Commissioner himself to make a reference under Section 66 (1) of the Act.*

NIAMATULLAH, J.—*It must be borne in mind that an assessment under Section 23 (4) should not be influenced by a desire to punish the assessee for a non-compliance with a notice under Section 22 or Section 23, however culpable such non-compliance might be.*

ABDUL BARI CHOWDHURY *v.* COMMISSIONER OF INCOME TAX [1931] (I.L.R. 9 Rang. 281; A.I.R. [1931] Rang. 194; 133 I.C. 81), followed.

ANANDA *v.* COMMISSIONER OF INCOME TAX [1931] (I.L.R. 11 Pat. 181; A.I.R. [1931] Pat. 306; 12 P.L.T. 915; 133 I.C. 753), dissented from.

Cases referred to:

DUNI CHAND *v.* COMMISSIONER OF INCOME TAX [1929] (I.L.R. 10 Lah. 596; 117 I.C. 69).

MAHARAJADHIRAJA OF DARBHANGA *v.* COMMISSIONER OF INCOME TAX [1929] (I.L.R. 9 Pat. 240).

MUHAMMAD HAYAT *v.* COMMISSIONER OF INCOME TAX [1931] (I.L.R. 12 Lah. 129; A.I.R. 1931 Lah. 87; 131 I.C. 81).

Application under Section 66 (3), Income-tax Act, for an order requiring the Commissioner of Income-tax, United Provinces, to state a case and to refer certain questions of law for the decision of the High Court.

K. N. Katju and *M. N. Kaül*, for the assessee.

K. Verma, for the Income-tax Commissioner.

The following judgments were delivered :—

NIAMATULLAH, J.—This is an application by a firm styled Jot Ram Sher Singh of Muzaffarnagar, under Section 66 (3) of the Income Tax Act, for an order requiring the Commissioner of

Income Tax to state a case and to refer certain questions for decision by this Court.

The case relates to the assessment of income-tax on the applicants for the year 1930-31. The assessees made a return, in which they showed a loss of Rs. 2,845-5-0 in 1929-30. They had to be assessed on the income of the preceding year, *i.e.*, 1929-30, corresponding to the *Sambat* year 1986. A notice was issued under Section 23 (2) requiring them to prove the correctness of their return. They produced certain accounts, and were assessed, on May 13, 1930, on an income of Rs. 5,113. The order of assessment, recorded by the Income Tax Officer, shows, that the account books for 1986 *Sambat* were before him. Whether complete accounts had been produced or those for a particular branch of the assessees' business were the only accounts then produced is not clear. It is, however, clear that the Income Tax Officer did not then raise any question concerning the accounts. The proceedings took place before the Income Tax Officer, Muzaffarnagar, who made certain enquiries from the Income Tax Officer, Rohtak, where the assessees had some business connections. The latter informed the Income Tax Officer, Muzaffarnagar, that the assessees had considerable business in that district in the names of their sons and grandsons, and suggested that the personal accounts of their sons and grandsons should be carefully examined. In the meantime the Income Tax Officer, Muzaffarnagar, who had first made the assessment, was succeeded by another officer, who took proceedings under Section 34, which provides for assessment on income which had escaped notice and for cases in which too low an assessment was made. The assessees were called upon by a notice to produce their accounts for *Sambat* 1986. They did not produce such accounts and alleged that the same had been lost. They relied upon evidence consisting of a police report and a telegram and other evidence. The Income Tax Officer however did not accept the storyof the loss of the accounts and proceeded to make a fresh assessment under Section 34. It cannot be disputed that all the provisions contained in Sections 22 and 23 are applicable to proceedings under Section 34. The Income Tax Officer made an assessment to the best of his judgment under Section 23 (4), as the result of the failure of the

assessees to produce their account books for *Sambat* 1986. There is no doubt that if the finding of the Income Tax Officer, namely, that the account books had been deliberately withheld, were correct, assessment under Section 23 (4), *i.e.*, assessment to the best of his judgment, was justified. The significance of such an assessment is that no appeal lies therefrom (*see* Proviso to Section 30).

In making a fresh assessment the Income Tax Officer estimated the assessees' income to be Rs. 75,000. They were accordingly called upon to pay income-tax on that amount. The assessees made an application under Section 27 which empowers the Income Tax Officer to cancel the assessment and to make a fresh assessment if he is satisfied that the assessee was prevented by sufficient cause from complying with the notice under Section 23 (2). The Income Tax Officer dismissed the assessees' application under Section 27 holding that no sufficient cause had been established. The cause which the assessees had attempted to show was the loss of their accounts for *Sambat* 1986—a fact which had already been investigated and found not proved. An appeal to the Assistant Commissioner from the order of the Income Tax Officer under Section 27 was unsuccessful. The assessees applied to the Commissioner under Section 33 for revision of the orders passed by the Income Tax Officer. The Commissioner set aside the assessment and directed further enquiry and a fresh assessment. The Income Tax Officer again assessed the tax on an income of Rs. 75,000. The assessees again applied under Section 27 and finally moved the Commissioner in revision. The previous revision had been disposed of by Mr. Muir, who was subsequently succeeded by Mr. Wali Muhammad, who dealt with the second revision. The revision was dismissed and an application by the assessees for a reference to the High Court was also dismissed. The principal question which the assessees desired to raise and which, they submitted, is one of law, was whether an Income Tax Officer can arbitrarily assess on an assumed income in making a best judgment assessment under Section 23 (4). The Commissioner held that in the first place the assessment was not arbitrary, and in the second place, even if it was arbitrary, there could be no appeal or reference against it. There were other subsidiary questions which it is not necessary to mention.

A preliminary question which calls for decision in this case is whether the High Court can require the Commissioner to state a case for decision by the High Court of questions of law arising from an assessment under Section 23 (4), Income Tax Act. Having carefully examined the scheme of the Act, I am constrained to hold that the High Court has no such power.

Section 66 (1) empowers the Commissioner to make a reference to the High Court whenever in the course of any assessment a question of law arises before him. But the right of the assessee to insist on the Commissioner making a reference to the High Court and his right to move the High Court for an order requiring the Commissioner to state a case and make a reference are limited. Under Section 66 (2) the assessee can apply to the Commissioner requiring him to refer to the High Court any question of law arising out of orders under Section 31 or Section 32, or of a decision by a Board of Referees under Section 33A. No order under Section 32 was passed against the assessees, nor are we concerned with any decision by a Board of Referees under Section 33A.

The only question is whether there was an order under Section 31. That section deals with the exercise by the Assistant Commissioner of his appellate power. Section 30 prescribes the limits of the appellate powers of the Assistant Commissioner. An appeal lies to the Assistant Commissioner from an assessment under Section 23 or Section 27, but no appeal lies from an assessment under Section 23 (4). Appeals also lie from an order of the Income Tax Officer refusing to make a fresh assessment under Section 27, an order under Section 25 (2), Section 25A or Section 28. It is thus clear that the Assistant Commissioner can pass an order under Section 31 (in appeal) in certain cases which do not include one in which an assessment under Section 23 (4) has been made.

Section 30, Proviso, expressly declares that there shall be no appeal from an assessment to the best of the Income Tax Officer's judgment under Section 23 (4) or under that sub-section read with Section 27. Accordingly no question of law or fact arising from such assessment can be the subject of consideration by the Assistant Commissioner for the simple reason that no appeal lies to him, with the result that the Assistant

Commissioner can never have an occasion to pass in appeal an order under Section 31 in relation to a best judgment assessment. As already shown, the High Court can require the Commissioner to make a reference for decision by the High Court of a question of law, only if it arises from an order under Section 31. It is argued, on the authority of *Ananda* v. *Income Tax Commissioner*, that the order of the Assistant Commissioner, rejecting an appeal on the ground that it did not lie, is an order under Section 31 " disposing of an appeal." This is the view taken by the majority of the judges composing the Full Bench. It is said that there is no other section under which such an order *in limine* can be passed. With great respect I would point out that a tribunal cannot " dispose of an appeal " if what purports to be an appeal is no appeal and is held by the tribunal to be incompetent. Where the Assistant Commissioner rejects what purports to be an appeal on the ground that none lies, he gives effect to the Proviso to Section 30, and his order should be deemed to be one under it and not under Section 31. In passing such an order, the Assistant Commissioner refuses to entertain the appeal, and cannot be considered to be " disposing of an appeal," which implies the assumption that the appeal lay, was entertained and disposed of, after discussion of some question falling within the purview of the appeal.

In my opinion it is not open to the Assistant Commissioner to express the opinion that the Income Tax Officer should not have assessed to the best of his judgment under Section 23 (4) if the latter stated in his order that a case existed for assessment to the best of his judgment. Any abuse of power by the Income Tax Officer or perversity of judgment is to be corrected by the Commissioner in revision, but the Assistant Commissioner has no jurisdiction, where he has before him what purports to be an appeal from an assessment under Section 23 (4). It is only if he has jurisdiction to entertain the appeal that he can say whether the assessment was perverse or arbitrary. That stage cannot be reached if he is not allowed by law to entertain an appeal from it.

A refusal to make a fresh assessment under Section 27 can proceed only on the ground that the assessee was not prevented by any sufficient cause from complying with the notice under

Section 22 or Section 23. If any question of law arises from such refusal, it can certainly be the subject of reference under the orders of the High Court. But any question of law which arises from the best judgment assessment, sought to be set aside by an application under Section 27, cannot fall within the purview of Section 27. This being so, the question whether a wholly arbitrary assessment under Section 23 (4) on assumed income or on conjectural estimate thereof involves an error of law cannot be the subject of reference under the orders of the High Court. All other similar questions arising in connection with such assessment cannot be brought before the High Court at the instance of assessees, unless the Income Tax Commissioner chooses to act under Section 66 (1).

Whether this is a lacuna in the Act or the power of the High Court was deliberately excluded by the legislature in respect of assessment made under Section 23 (4) it is difficult to say. As the law stands, the assessee has to be content with such relief as the Commissioner may give him in the exercise of his revisional powers under Section 33, which undoubtedly confers upon him a wide discretion in dealing with questions arising in the course of assessment by officers subordinate to him. He can, in the exercise of those powers, interfere with an assessment made by the Income-Tax Officer to the best of his judgment under Section 23 (4). He may also decide the question whether such assessment was arbitrary and unreasonable. As a matter of fact, Mr. Muir did interfere with the first assessment. The Commissioner may also make a reference to the High Court for decision of any question of law that may arise in revision; but he cannot be ordered by the High Court to do so, nor can the assessee claim as of right that any question of law be referred to the High Court.

It is difficult to find any reason for distinction between questions of law arising from orders under Section 31 and those under Section 33. *Prima facie* there is as much reason for power being given to the High Court to require a reference to be made in respect of questions of law arising from orders under Section 33 as in case of orders under Section 31. The present case itself affords a striking instance of the desirability of such power being given. The Income Tax Officer who made an

assessment in the first instance, found the income to be Rs. 5,113. In making a fresh assessment to the best of his judgment his successor estimated the income to be Rs. 75,000. The 'estimate' rests on nothing but what the Income Tax Officer chose to assume as the income in *Sambat* 1986. The so-called reasons, on which the estimate is based, if justifiable, can as well warrant the assumption that the income was much more or much less. Where the Income Tax Officer is to make an assessment to the best of his judgment it should not be an assessment by way of penalty; his judgment ought to proceed on some data, including legitimate presumptions arising from non-production of the account books. The assessees' books for the preceding years and those for subsequent years were available, and in making an assessment to the best of his judgment the Income Tax Officer might well have drawn inferences from receipts in those years. Such inferences together with other facts which a careful enquiry might disclose could have formed a satisfactory basis for an assessment. It should be borne in mind that an assessment under Section 23 (4) should not be influenced by a desire to punish the assessee for non-compliance with a notice under Section 22 or Section 23, however culpable such non-compliance may be. Any deliberate concealment or mis-statement of the particulars of his income by the assessee is made punishable by Section 28 ; and if his act amounts to an offence under that section he should be tried and convicted if the offence is proved, in which case the law gives him a right to appeal, but to punish him indirectly by making a so-called best judgment assessment is wholly unwarranted. The question of law, which arises in such cases, has reference to the meaning of the expression " assessment to the best of his judgment," and its application to the facts of a particular case.

My examination of the relevant sections of the Income Tax Act has led me to the conclusion that the High Court cannot in this case direct the Income Tax Commissioner to make a reference to this Court for decision of the question which the assessees desire to raise. The view that I have taken is in accord with *Abdual Bari Chowdhury* v. *Income Tax Commissioner, Burma*. We have been referred to *Muhammad Hayat Haji*

Muhammad Sardar v. *Commissioner of Income Tax*, in which the High Court passed an order requiring the Income Tax Commissioner to make a reference for decision of questions of law arising from assessments under Section 23 (4). No question was, however, raised in this case as regards the power of the High Court to require the Commissioner to make a reference. It was merely assumed that the High Court had such power.

The result is that I dismiss the application with costs.

BENNET, J.—This is an application by an assessee asking for this Court to call on the Commissioner of Income Tax to state a case under Section 66 (3) of the Income Tax Act. The questions on which learned counsel presses that a case should be stated are those numbered (1), (3), (4) and (5) in the application and are as follows:—

(1) Whether in the absence of any evidence whatever to prove the possession of the 4 account books for the *Sambat* year 1986 by the petitioner, the Income Tax Officer was justified in law in holding that the petitioners had been guilty of non-production of the said books?

(3) Whether the Income Tax Officer, being fully aware by January 15, 1931, that the petitioners were not in possession of the aforesaid 4 account books for the *Sambat* year 1986 was justified in commencing proceedings under Section 34 of the Act and whether his action in demanding production of the said books and then proceeding under Section 23 (4) of the Act was legal and regular?

(4) Whether under the circumstances of the case the assessment was really made under Section 23 (3) of the Act and the appeal to the Assistant Commissioner of Income Tax should have been entertained and heard on the merits?

(5) Whether the assessment being purely arbitrary and based on no materials whatever was justified in point of law?

The facts of the case have been set out in the order of the Income Tax Officer making the assessment dated June 29, 1932, These facts are that for the year in question 1930-31 there was first of all an assessment made and in that assessment, dated

May 20, 1930, a tabular statement was quoted showing totals which were derived from the account books for the *Sambat* year 1986 which were produced. The Income Tax Officer does not appear to have done more than to object to seven items which the assessee desired to deduct and the Income Tax Officer refused to allow this deduction and made an assessment on the tabular statement of an income of Rs. 5,113. Subsequently a notice was issued under Section 34 on the ground that income had escaped assessment, and the Income Tax Officer required that the books should be produced again. By this time the books had been lost according to the assessee and they were not produced. The Income Tax Officer therefore claimed that he had a right to make a best judgment assessment under Section 23 (4) and proceeded to do so. A revision was filed to the Commissioner against that best judgment assessment, and the Commissioner set it aside by an order dated November 28, 1931, and required the Income Tax Officer to weigh the evidence more carefully. An assessment was made again by the Income Tax Officer on June 29, 1932, and he again assessed the income at Rs. 75,000. It is this assessment order which is now called in question. The actual assessment portion of the order occupies two typed pages, and the Income Tax Officer has given certain reasons for coming to the conclusion that the income was Rs. 75,000. The assessee claims that those reasons are arbitrary and that the assessment is based on no materials, and therefore is not a valid assessment in law. The assessee made an application under Section 27 for cancellation of the best judgment assessment on the ground that he was prevented by sufficient cause from producing the books, and that application was rejected. The assessee then filed an appeal before the Assistant Commissioner of Income Tax both against the order rejecting the application under Section 27 of the Income Tax Act and against the best judgment assessment under Section 23 (4), and he claimed that it should be treated as an assessment under Section 23 (3). On September 1, 1932, the Assistant Commissioner held that there was no sufficient reason to interfere with the order under Section 27 and he dismissed the appeal under that head. In regard to the appeal against the assessment under Section 23 (4) he held that no appeal lay and that he was unable to entertain such an appeal. An application

was then made to the Commissioner to state a case which he refused to do. In this connection the Commissioner referred to the ruling reported in *Abdul Bari Chowdhury* v. *Commissioner of Income Tax, Burma*, that the assessee had no right of application for reference to the High Court in the case of a best judgment assessment under Section 23 (4).

The first question which has arisen for decision in this appeal is whether the order which the assessee desires can be made by this Court. The powers of this Court to require the Commissioner to state a case are given in Section 66 (3) which begins:

> "If on any application being made under sub-section (2) the Commissioner refuses to state a case" etc.

This shows that the power of requisition of this Court is limited in the same manner that an application under sub-section (2) is limited. Sub-section (2) states:

> "Within one month of the passing of an order under Section 31 or Section 32 the assessee in respect of whom the order was passed may........require the Commissioner to refer to the High Court any question of law arising out of such order........ .."

A question therefore must be in regard to any question of law arising out of an order under Section 31 or Section 32. Section 31 deals with the hearing of an appeal by an Assistant Commissioner, and Section 32 deals with the hearing of an appeal by the Commissioner against an order passed by an Assistant Commissioner under Section 28, or an order enhancing an assessment under Section 31 (3). Section 28 deals with an order directing a penalty for concealment of income. We are not concerned here with any order under Section 32. Learned counsel for the assessee argues that the order of the Assistant Commissioner is an order under Section 31 and that therefore a requisition can be made by this Court. On the other hand it is contended by learned counsel for the Income Tax Commissioner that the order is not one under Section 31 and that therefore there can be no requisition by this Court. There were in fact two appeals before the Assistant Commissioner, Nos. 25 and 26. One of these, appeals was against the order of the Income Tax Officer rejecting the application under Section 27 of the Income Tax Act, and

the other appeal was against the assessment under Section 23 (4). The Assistant Commissioner disposed of these two appeals by one order dated September 1, 1932, noting on the other appeal that it was governed by this order. In regard to the appeal against the order under Section 27 he held that there was no sufficient reason to interfere with that order. He found that the assessees had been in possession of the books and that they had purposely withheld them and that their story that the books had been lost was untrue. Now the first question which the assessee desires to be treated as a question of law is in regard to this finding of fact and is as follows:—

> Whether in the absence of any evidence whatever to prove the possession of the 4 account books for the *Sambat* year 1986 by the petitioner, the Income Tax Officer was justified in law in holding that the petitioners had been guilty of non-production of the said books?

The assumption underlying this question is that it was necessary for the finding that there should be some oral evidence to the effect that the books were still in the possession of the assessee. This is a very common delusion and is constantly brought forward in argument. The theory is contrary to the provisions of Section 103 of the Indian Evidence Act, which is as follows:—

> The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In the present case it was admitted that these books had existed and had been produced before the Income Tax Officer in the original assessment dated May 20, 1930. The assessee desired the Court to believe that these books had been lost subsequently. The burden of proof of that fact lay on him. It was for the Income Tax Officer and the Assistant Commissioner to decide whether he had discharged that burden or not. They considered that the evidence which he produced was not sufficient to prove his allegation. No question of law arises from their decision on this point.

The question No. 3 which I have quoted does not appear to embrace any point of law which could arise and

it appears to be merely an argument against the action of the Income Tax Officer based on the idea that because the assessee had made the allegation in regard to the loss of his books, which was subsequently held to be untrue, therefore the Income Tax Officer ought not to have taken proceedings under Sections 34 and 23 (4) of the Act. No question of law can arise out of such an argument.

The remaining questions Nos. 4 and 5 raise the point in regard to the assessment under Section 23 (4) and therefore this involves the point as to whether the order of the Assistant Commissioner in respect to this matter was or was not made under Section 31. The Assistant Commissioner held in regard to the appeal No. 25 :—

> I hold that the assessment is one under Section 23 (4) and I decline to admit the appeal,

and further he held :—

> I hold that the assessment was properly made under Section 23 (4) by the Income Tax Officer against which no appeal lies. I am therefore unable to entertain the other appeal also which is against the assessment.

Clearly, therefore, the Assistant Commissioner refused to entertain this appeal under Section 31 on the ground that no appeal lay. This is in accordance with the Proviso in Section 30 which is as follows :—

> Provided that no appeal shall lie in respect of an assessment made under sub-section (4) of Section 23, or under that sub-section read with Section 27.

In spite of this clear provision in the Act learned counsel for the assessee has argued at length that an appeal does lie against an assessment under Section 23 (4) of the Act. I cannot imagine that any clearer provision could be made in the Act to show that no appeal shall lie in respect of an assessment under Section 23 (4). The intention of the Act clearly is that in the case of an assessment under Section 23 (4) there shall be no appeal, but the remedy of the assessee is limited to an application to the Commissioner to make a revision under Section 33. In the present case the assessee did go once in revision to the Commissioner and the Commissioner set the assessment aside

by his order of November 28, 1931. But instead of applying again in revision to the Commissioner against the new assessment of June 29, 1932, the assessee has adopted the wrong remedy and has attempted to proceed by way of appeal to the Assistant Commissioner and by way of requiring this Court to direct the Commissioner to state a case. It is not apparent why the assessee should have adopted this wrong method of procedure in view of the clear provisions of the Act.

Learned counsel for the assessee relies on certain rulings, one of which is by a Bench of the Patna High Court in *Maharajadhiraj of Darbhanga* v. *Commissioner of Income Tax*. There does not appear to be any reference to the question before us in that ruling. On pages 278 and 279 there was some discussion in regard to a reference at the instance of the assessee to the High Court under Section 66, but it is clearly stated that the reference was in regard to a question of law arising out of an order under Section 31 or Section 32, and there was no suggestion that a reference could be made where there was a case of a best judgment assessment under Section 23 (4). The ruling therefore does not support the case of the assessee at all. Another case on which the assessee relies is *Muhammad Hayat Haji Muhammad Sardar* v. *Commissioner of Income Tax*. In that ruling a Full Bench of the Lahore High Court considered the question as to whether in the making of an assessment under Section 23 (4) the Income Tax Officer possesses arbitrary authority or should be guided by judicial principles. It was held that he did not possess arbitrary authority but was bound by strict judicial principles and he should be guided by rules of justice, equity and good conscience, and that the assessment should be reasonable and should not proceed purely on the Income Tax Officer's private opinion to the exclusion of the material before him.

But the ruling is not authority whatever for the proposition put forward by learned counsel for the assessee, that is, that the assessee has a right to ask this Court to call upon the Income Tax Commissioner to state a case on this point. Learned counsel had altogether failed to notice that the ruling in question arises on a reference by the Commissioner of Income Tax

himself, as is stated on page 130. A reference by the Commissioner comes under Section 66 (1), and such a reference may be on a question of law arising

> " in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VIII."

Section 23 (4) comes within Chapter IV and therefore it was competent for the Commissioner to make a reference of the question of the principles which should guide an Income Tax Officer in making an assessment to the best of his judgment under Section 23 (4). But it is not competent for the assessee to apply under Section 66 (2) for a similar reference. Nor has this Court jurisdiction to direct the Commissioner to state a case on the point under Section 66 (3).

Learned counsel laid stress on the case of *Ananda* v. *Commissioner of Income Tax*. The Court had ordered the Commissioner to state a case on two points in regard to an assessee who claimed that he had no income arising in British India, and who had been assessed under Section 23 (4), and whose petition under Section 27 had been rejected. The Assistant Commissioner held that the assessment was rightly made under Section 23 (4) and the petition rightly rejected under Section 27, and he then went on to discuss the merits of the case and held that there was income assessable in British India. Application was made in revision under Section 33 to the Commissioner and he was also asked to state a case under Section 66 (2). He held that no case should be stated under Section 66 (2) as the assessment was under Section 23 (4) and that the Assistant Commissioner should have dealt with this latter point only and should have rejected the appeal *in limine*. The case was ordered to be stated on the two points :

(1) Whether a person who has been assessed under Section 23 (4) is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the said Act, or whether the Proviso to Section 30, clause (1), is a bar to the appeal; and

(2) Whether on the facts of the present case the assessee is liable to be assessed under the Act.

The Full Bench found unanimously against the assessee on both these points. The question now before us was never precisely formulated in this case but it was raised in argument for the Commissioner and opinions have been given on it although as the learned Chief Justice says on page 309, column 2, "it does not directly arise." The learned Chief Justice and three Judges held that

> "it is the duty of the Commissioner, if required by the assessee, to state a case raising the question of law whether or not the facts established before the Assistant Commissioner are such as to bring the assessee within the ambit of the Proviso to Section 30 (1)."

(Page 311, column 1). He also held on page 310, columns 1 and 2:

> "In so rejecting the appeal he is, in my opinion, under Section 31 'disposing of an appeal' and such disposal is 'a proceeding in connection with an assessment under this Act.'"

In column 2 he then proceeds to discuss the ruling, *Duni Chand* v. *Commissioner of Income Tax*, which says that

> "When the Assistant Commissioner is satisfied that the assessment was made, not ostensibly but genuinely under that sub-section, he must stay his hand and decline to adjudicate upon the merits of the appeal on the short ground that the Proviso to Section 30 (1) bars an appeal in such a case."

With great respect to the learned Chief Justice of Patna I am unable to agree that this quotation supports the view that the order of the Assistant Commissioner is an order disposing of the appeal under Section 31. The other ground which is given on page 310, column 1, is as follows:—

> "Whatever the technical legal considerations the general duty of the Court to stand between the subject and the Crown in the matter of illegal taxation forces me to regard this contention as very unattractive."

Now in England there is such a general duty, because the English Courts inherit the jurisdiction of the Court of the Exchequer, which had this special jurisdiction. But there is no

such jurisdiction granted to the High Courts in India by their Letters Patent, nor by any Act, as in general these Acts dealing with land revenue etc., provide that such taxation shall be excluded from the jurisdiction of the High Courts, and there are special revenue Courts in India for the exercise of such jurisdiction. In regard to this very matter of income-tax, so far from the High Court having any general jurisdiction "to stand between the subject and the Crown" the jurisdiction of the High Court is limited to the decision of points of law on a reference arising under certain conditions.

Mr. Justice Fazl Ali, on page 316, column 2, gave his reason in these words:

> "as far as I am aware there is no section in the Income Tax Act except Section 31 under which the order could have been passed."

And on page 320, column 2, Mr. Justice Dhavle gave a similar ground:

> "If the order be not an order under Section 31, there is no other section in the Act under which it can come."

In my opinion with due respect to these learned Judges there is another section under which the order is passed, Section 30 (1), Proviso, and the learned Judges do not seem to have considered this view at all. I consider that this proviso deals with the preliminary point as to whether an appeal shall be heard under Section 31, and it is only where the Assistant Commissioner finds in favour of the assessee that he would proceed to hear the appeal under Section 31. I consider that the appeal under Section 31 relates to the matters enumerated by the sub-section 30 (1), that is the amount or rate of assessment or the liability to be assessed etc. The question of whether an appeal is barred by the Proviso to Section 30 (1) is a question which is decided under that proviso and not under Section 31. The judgment of the Patna High Court was not unanimous on the point, and Mr. Justice Wort says on page 313, column 2:

> "The assessee's main contention is that in spite of the Proviso to sub-section (1), Section 30, he has had an appeal to the Assistant Commissioner. The argument is based on the interpretation which he desires this Court to

> place upon the word 'assessment' in the Proviso to sub-section (1), Section 30. The argument is that when you come to the Proviso to the sub-section the word 'assessment' only is used, and it is contended that what is meant by the use of the word is merely assessment as regards the amount and that the Proviso does not prohibit the assessee in the case of a 'summary' assessment from appealing as regards. his liability . . . . In my judgment the word 'assessment' in the Proviso is used in the wider sense ... If the assessee had no appeal there could be no order under Section 31 excepting an order stating that no appeal lay. It is not such an order which is contemplated by Section 66, and if it is not, the Commissioner cannot be called upon to state a case as no question of law arises." (Page 314, column 2).

It appears to me that the main objections to the view of the majority of the Judges of the Patna High Court are: (1) The Proviso of Section 30 (1) is definite—"no appeal shall lie"—and general. It does not say

> no appeal shall lie as to the amount, rate or liability, but an appeal shall lie as to whether the facts established that the assessment was liable to be made under Section 23 (4).

There is no suggestion in the sub-section that the point is to be decided under the next section.

(2) Section 30 (1) lays down the subject-matter of an appeal under Section 31, and then proceeds to exempt a certain kind of case—presumably it must exempt it from the operation of Section 31.

(3) The obvious intention of the Act is to penalize an assessee who brings himself within the provisions of Section 23 (4). It would be contrary to that intention to strain the language of the Act and allow such an assessee to have the right to bring any question before this Court by a case stated by the Commissioner at the instance of the assessee either directly or through this Court. There is no precisely similar procedure before the civil Courts. But there are matters somewhat similar. For example, appeals are in general disposed of under Order 41 just as in general the Assistant Commissioner disposes of

appeals under Section 31, Income Tax Act. But where the appellate Court rejects a memorandum of appeal on the ground that no appeal lies, that order is passed under Order 7, Rule 11, which is applied to appellate Courts by Section 107 (2). And where the appellate Court returns a memorandum of appeal for presentation to the proper Court, it acts under Order 41, Rule 10, and Section 107 (2). There is no provision in Order 41 for such orders by an appellate Court. It would not be correct to refer to such orders as "orders under Order 41 of the Civil Procedure Code." Similarly it is not correct to refer to the order of an Assistant Commissioner holding that no appeal lies because the assessment was made under conditions where Section 23 (4) was properly applied as an order under Section 31; it is an order under Section 30 (1), Proviso.

Learned Counsel also referred to certain rulings of the Rangoon High Court which were in his favour. But those rulings have been definitely overruled by the Full Bench ruling reported in *Abdul Bari Chaudhury* v. *Commissioner of Income-tax.* In that case the question considered was exactly the question which is now before us, and the five judges unanimously held that the question whether an assessment under Section 23 (4) is valid or not is not a question of law that arises or can arise out of an order of the Assistant Commissioner passed under Section 31, and consequently such a question cannot be made the ground for an order by the High Court under Section 66 (3) requiring the Commissioner to state a case. The judgment proceeds on the point that the Proviso to Section 30 (1) bars any appeal against an assessment under Section 23 (4) and therefore such an assessment cannot be the subject of an order in appeal under Section 31, and therefore cannot be the subject of a reference under Section 66 (2) and (3). This Full Bench judgment of the Rangoon High Court, in my opinion, correctly lays down the law on the point and therefore I follow it.

Some reference was made for the assessee to Act No. XVIII of 1933 amending the Indian Income Tax Act, which was published in the U. P. Gazette of October 7, 1933, at page 154. By Section 28 of the Amending Act an amendment is made in Section 66 of the Income Tax Act. It was claimed that by

that amendment if there was a revision under Section 33 then a right to require a reference would arise under Section 66 (2). This claim is incorrect. It is only in case that there is an order under Section 33 enhancing an assessment or otherwise prejudicial to the assessee that a reference can be claimed under Section 66 (2).

For the reasons stated I consider the assessee has no right to demand a reference on the points and that this Court is not entitled to order a case to be stated on these points. The application is therefore dismissed with costs. The fee of the learned counsel for the Commissioner is assessed at Rs. 75.

BY THE COURT—The application is dismissed. The fee of the counsel for the Income Tax Commissioner shall be taxed at the rate of Rs. 75 if a certificate is filed within a month.

Application dismissed.

[IN THE PRIVY COUNCIL.]

TRUSTEES OF SIR CURRIMBHOY IBRAHIM BARONETCY TRUST

v.

COMMISSIONER OF INCOME TAX, BOMBAY.

LORD BLANESBURGH, LORD MERRIVALE AND SIR SYDNEY ROWLATT

February 26, 1934.

INCOME TAX—TRUST—TRUSTEE'S LIABILITY TO PAY TAX—SIR CURRIMBHOY IBRAHIM BARONETCY TRUST ACT (IV OF 1913)—INCOME TAX ACT (XI OF 1922), SECTIONS 2, 3 and 42.

The Indian Legislature passed an Act for settling certain properties belonging to a Baronet so as to accompany and support the title and dignity of a Baronet. The appellants were incorporated as trustees for executing the trusts, powers and purposes of the Act and certain properties were vested in the corporation upon trust. The corporation was to pay out of the income all rates and taxes and was required to form two funds called the sinking fund and repair fund out of the income, and the residue was to be paid to the Baronet for the time being. The question arose whether the appellants were liable to be assessed in respect of the whole or any part of the income of the trust.—Held, *that it*

was clear that so far at least as concerned the money which the appellants employed in maintaining the funds and in defraying the outgoings the appellants were liable to be assessed;

Held further, *that the appellants were also liable to be assessed in respect of the balance of trust income, namely, that part of it which was paid over to the Baronet.*

Commissioner of Income-tax, Bombay v. *Trustees of Sir Currimbhoy Ibrahim Baronetcy Trust* [1931] (136 I.C. 488) affirmed.

Case referred to :

WILLIAMS *v.* SINGER [1921] (1. A.C. 65; 89 L.J.K.B. 1151; 123 L.T. 632 ; 7 Tax Cas. 387).

Appeal from a judgment of the Bombay High Court. The judgment appealed from is reported in 136 Ind. Cas. 488 and 33 Bom. L.R. 1549.

Wilfrid Greene, *Sir T. J. Strangman* and *S. P. Khambatta*, for the appellants.

A. M. Dunne and *R. P. Hills*, for the respondent.

SIR SIDNEY ROWLATT.—The question in this case, as it finally came before the High Court of Judicature at Bombay is whether the appellants, who are a body of trustees incorporated by an Act of the Indian Legislature, are liable to be assessed to income-tax and super tax (which in this respect stand upon the same footing) in respect of the income of the trust or whether as regards the whole or any part of it they are not so liable on the ground that they are not beneficially interested. Certain complications, arising out of previous practice, which affected the case in its earlier stages, were got rid of by arrangement and need not now be noticed. The question so propounded was answered in the affirmative by the High Court in a judgment dated 18th August, 1931. This is an appeal by the trustees, an incorporated body. The Act incorporating them (Act IV of 1913) is described in its title as an Act for settling certain properties belonging to Sir Currimbhoy Ibrahim, Baronet, so as to accompany and support the title and dignity of a Baronet and for other purposes connected therewith. By Section 2 of this Act the appellants were incorporated as trustees for executing the trusts, powers and purposes of the Act and by Section 5

certain freehold and leasehold hereditaments specified in Schedules to the Act were vested in the corporation upon trust to permit the Baronet for the time being to use and occupy certain parts of the properties, rent free, and as to the rest to demise the same subject to certain conditions. By Section 6 the corporation was to pay out of the income from the properties all rates and taxes and sundry other outgoings. By Section 7 the corporation was required to form two funds, called the Sinking Fund and the Repair Fund, and to carry annually thereto respectively out of the income of the properties, certain sums calculated on percentages of capital sums there specified. By Section 8 the residue of the income was to be paid to the Baronet for the time being, if of full age for his own absolute use and benefit. Section 29 provided that the actual management of the properties including the collection of rents and the carrying out of repairs should be in the hands of the Baronet for the time being, subject nevertheless to the control and supervision of the corporation. The present Baronet, the third holder of the title, succeeded before the commencement of the financial year (1928-29) to which this case relates, being then of full age. Of the total income of the trust roughly 75 per cent. was paid to the Baronet, about 10 per cent. having been carried to the Sinking Fund and Repair Fund and the remaining 15 per cent. having been absorbed by rates, taxes and other outgoings.

The taxing Act under which the question in this case arises is the Income Tax Act, 1922, as subsequently amended. By Section 2 of that Act "assessee" is defined as meaning "a person by whom income-tax is payable" and "person" by virtue of the General Clauses Act, 1897, Section 3 (39), "includes any company or association or body of individuals whether incorporated or not." Chapter 1 of the Act, containing Sections 3 and 4, is headed "Charge of Income Tax." Section 3 as amended is as follows:

"Where any Act of the Indian Legislature enacts that income tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act, in respect of all income, profits and gains of the previous year of every individual, Hindu

undivided family, company, firm and other association of individuals."

By Section 4 it is provided that the Act should "apply to all income, profits or gains as described or comprised in Section 6."

Chapter 3 of the Act, containing Sections 6-17, is headed "Taxable Income." Section 6 is as follows:

"Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely, (i) salaries, (ii) interest on securities, (iii) property, (iv) business, (v) professional earnings, (vi) other sources."

Section 7 deals with "salaries." Sections 8 and 9 deal with "interest on securities" and "property," which are the heads with which this case is concerned. These two sections, so far as material, are as follows:

"Section 8. The tax shall be payable by an assessee under the head "interest on securities" in respect of the interest receivable by him on any security of the Government of India or of a local Government, or on debentures, etc.

Section 9. The tax shall be payable by an assessee under the head 'Property' in respect of the *bona fide* annual value of property consisting of any building or lands appurtenant thereto of which he is the owner. . . . ."

Provisos to Section 8 relieve the assessee from income-tax on certain securities issued tax free, but by Section 16 these provisos do not apply in the computation of the total income of an assessee. By virtue of Section 14 (2) and Section 16 the position is the same as regards dividends and shares of profits received from companies or firms whose profits have been taxed. Section 22 (2) provides for a return of total income and Section 23 (1) for assessment of the total income of an assessee and determination of the amount payable on the basis of such return. Provisions follow for the verification and, if necessary, correction of the figures returned. Chapter 9 of the Act is headed "Super tax." The first two sections in the chapter, namely, Sections 55 and 56, are (omitting a proviso to Section 55 immaterial for present purposes) as follows:

"Section 55. In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income-tax (in this Act referred to as super tax) at the rate or rates laid down for that year by Act of the Indian Legislature.

"Section 56. Subject to the provisions of this Chapter, the total income of any individual, Hindu undivided family, company, unregistered firm or other association of indviduals shall, for the purposes of super tax, be the total income as assessed for the purposes of income-tax, and where an assessment of total income has become final and conclusive for the purposes of income-tax for any year, the assessment shall also be final and conclusive for the purposes of super tax for the same year."

For the year to which this case relates income-tax and super tax, both at graduated rates, were leviable by virtue of the current Finance Act.

As appears from the provisions above referred to, the scheme of the income-tax is that there is to be a statement of the total income of the assessee from which is to be deducted for the purpose of assessing income-tax, but not of super tax, nor for the purpose of any graduation of income-tax by reference to total income, the amounts of interest on tax free securities and of dividends and shares of profits already taxed. In the assessment in the present case the income of the appellants was assessed under three heads namely interest on tax free securities Rs. 1,02,390, interest on taxed securities (*i.e.*, dividends already taxed), Rs. 20,223, property Rs. 69,182, totalling together Rs. 1,91,795. Income-tax was accordingly charged on Rs. 69,182 and super tax on the total Rs. 1,91,795.

In the argument before their Lordships on behalf of the appellants it was in the first place attempted to support the broad proposition that these assessments were wholly wrong on the ground that trustees could not be assessed at all. In this connection the decision of the House of Lords in *Williams* v.

Singer, was referred to. In that case the question, as stated by Lord Cave, was whether income from foreign investments which was received abroad by a person not domiciled in this country was chargeable with income-tax under the Income Tax Acts by reason of the fact that the investments stood in the names of trustees domiciled in the United Kingdom. Under orders signed by the trustees the whole income from these investments was paid to the account of the beneficiary in New York. It was held that the trustees could not be assessed. Lord Cave, in whose opinion Lord Atkinson and Lord Shaw concurred, rejected the contention that for income-tax purposes the legal ownership was alone to be considered. On the other hand, he said that even apart from special provisions expressly enabling trustees to be charged in particular circumstances he was not prepared to deny that there were many cases in which a trustee in receipt of trust income might be chargeable with tax upon such income. He instanced, among other cases, a trustee who was under an obligation to apply the trust income in satisfaction of charges or to accumulate it for future distribution. Lord Wrenbury expressly refrained from dealing with a position of that kind, pointing out that it was not the case before the House. Lord Phillimore observed that it would seem in such circumstances that the assessment must be put upon the trustee.

An argument was also founded by counsel for the appellants upon Section 38 (2), Income Tax Act (which requires trustees, guardians and agents to furnish the revenue officials upon request with a return of the names and addresses of their beneficiaries or principals) and upon Section 40 (which provides for the assessment of guardians, trustees and agents of incapacitated or non-resident persons). It was said that the existence of these provisions supported a construction of the Act which would exclude trustees in other cases. It is to be observed however, that similar provisions in the United Kingdom Income Tax Acts were before the House of Lords in *Williams* v. *Singer* and Lord Cave expressly says that the cases in which he considered that trustees might be assessed were additional to the cases so expressly provided for.

In the result it is clear in their Lordships' view that so far at least as concerns the money which in the present case the

appellants employ in maintaining the Sinking Fund and the Repair Fund and in defraying outgoings no support is to be found in the opinions delivered in *Williams* v. *Singer* for the contention that the appellants cannot be assessed. Their effect is exactly the contrary, and in the end this contention (which would have the effect of exempting this income from all assessments whatever) was not strongly insisted upon.

The question remains as regards the balance of the trust income, namely that part paid over to the Baronet. The suggestion on behalf of the appellants was that this should be treated as drawn from the two heads of income, interest and property, proportionately and that the Baronet and not the appellants should be assessed in respect of it. The question as it arises upon the words of the statute is whether, to the extent indicated, the "interest" is "receivable" by the Baronet within the meaning of Section 8 and whether he is the "owner" of the "property" within the meaning of Section 9. In their Lordships' opinion the effect of the Act creating these trusts is not to give the Baronet for the time being any right to any part of the interest or property specifically or any right which, even granting that the legal title is not the only thing that can ever be looked at, would make it true to say that any proportion of the interest is not "receivable" or any proportion of the property is not "owned" by the incorporated trustees.

The whole income and every part of it is charged with the provision of the sums necessary to maintain the Sinking Fund and Repair Fund and to pay the outgoings and it is not until those liabilities have been met thereout by the corporation that the Baronet is entitled to what remains and then simply as so much money.

It was suggested that if the appellants are to be assessed, as has been done, it will result in double taxation, because the Baronet will also be liable to be assessed on what he receives from the trust and also that the assessment of trustees involves the graduation of the tax being applied with reference to the total income of the trustees, including that derived from other trusts or even belonging to them personally, and that, on the other hand, there would be no graduation with reference to the total income of the beneficiary either in his favour, where he

enjoys only a small benefit out of large estate with slender other resources, or in favour of the revenue in other cases. As regards the question of double taxation, the point does not call for any expression of opinion by their Lordships on the present occasion. If and when it comes up for decision it may or may not be found that that is the position. As regards the graduation it may be that it will be found compatible with the scheme and machinery of the Act to have the scale of tax adjusted according to the total income of the Baronet individually. The possibility of such a step which, as already indicated, might be either advantageous or disadvantageous to the Baronet cannot be discussed except in proceedings between the Baronet and the Revenue. The present decision goes no further than to affirm that the assessments on the appellants cannot be disturbed. In the result their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors:—*T. L. Wilson and Co.*, for appellants; *Solicitor, India Office*, for respondents.

[IN THE ALLAHABAD HIGH COURT.]

SETH GANGA SAGAR, *In re*.

NIAMATULLAH and BENNET, JJ.

August 18, 1933.

INCOME TAX—LOSS IN PURCHASE AND SALE OF SHARES AND SECURITIES—WHETHER CAPITAL LOSS OR LOSS IN BUSINESS—TESTS—INCOME TAX ACT (XI OF 1922), SECTIONS 2 (4), 4 (3) (vii) and 66 (3).

Where the assessee claimed deduction in respect of loss incurred by him on certain shares in a company which went into liquidation and in respect of certain Government securities which he had to sell at a loss, but the Commissioner found from the facts that the assessee did not carry on any business in the purchase and sale of shares or Government securities but had only invested his capital in shares and securities for earning dividends and interest:

Held, *that the Commissioner's finding was binding on the High Court and, as the loss incurred was a capital loss and not loss in business the claim for deduction was properly disallowed, and there was no ground for requiring the Commissioner to state the case.*

Whether a purchase of shares is made with the intention of speculating or merely to invest capital depends on intention of the purchaser and this intention must be deduced from the facts and circumstances of each case.

Application under Section 66 (3) of the Income Tax Act, 1922, to require the Commissioner of Income Tax, United Provinces, to state the case to the High Court.

Tej Bahadur Sapru and *G. S. Pathak*, for the assessee.

K. Verma, for the Crown.

Bennet, J.—This is an application by an assessee in income tax for this Court to require the Commissioner of Income Tax to state a case under Section 66 (3), Income Tax Act, XI of 1922. In stating the case the Income Tax Commissioner states the facts and on these facts this Court comes to a finding on a point of law. It is not open to this Court to find facts for itself. At the most under sub-section (4), Section 66, if this Court is not satisfied with the statement in a case the Court may ask for an additional statement or alterations. In the present case the assessee in his application to this Court states that he carries on banking and money-lending business, and for the purpose of that business the assessee sells and purchases shares and Government securities; that for the last 30 years shares in different companies have been purchased from time to time by the assessee's father and after his death by the assessee, and at present the assessee owns about Rs. 13 lacs of shares at par value; that in the course of the 30 years the assessee has sold shares amounting to rupees one lac and a half only; that in the books of the assessee he shows the dividend earned on the shares purchased and the interest accruing on Government Securities under the head of " profits " and he shows the loss on sales of shares in the category of losses in his books. He does not say that he shows in his books any profit which accrues from selling shares or securities at a higher price than the purchase price.

The assessee claims that two losses on shares and securities should be deducted from the sum which is taken as his income for the purpose of income tax. These losses are, firstly, Rs. 60,000, on account of loss incurred from the liquidation of the Tinnevelly Textiles Limited at Calcutta, and secondly, Rs. 4,912, on account of the purchase and sale of rupees one lac of Government Promissory Notes. These matters were held against the assessee by the Income Tax Officer, and the assessee filed an appeal before the Assistant Commissioner of Income Tax and the order of the Assistant Commissioner of Income Tax, dated 1st October, 1931, was also against the applicant. The Assistant Commissioner upheld the finding of the Income Tax Officer that both the items of loss in question were losses of capital and could not be allowed. The finding is as follows:

"The Income Tax Officer has found that the assessee does not carry on any business either in the purchase and sale of shares or in Government securities, and as such the investment of capital in shares and in Government securities is purely an investment for the purpose of earning interest and dividends and not for the purpose of carrying on any business."

The finding proceeds further that some years ago the question arose in regard to the British India Corporation in which shares had been purchased for over 30 years, and on two occasions these shares had been sold as the dividends declined. At that time it was held that the assessee was not carrying on any business in the purchase and sale of shares, but had only invested his money in shares in order to earn dividends. The assessee purchased the Tinnevelly Textiles Limited shares some 6 or 7 years ago; and he did not sell those shares, but the company had gone into liquidation in the year 1929-30. The Assistant Commissioner concluded that as the shares of the Tinnevelly Textiles Limited had been held for 6 or 7 years and there had been no sale of these shares, the purchase of these shares was only by way of an investment of capital, as the assessee had never dealt in the purchase and sale of these shares. In regard to the purchase of rupees one lac of Government Promissory Notes, this was made in the year 1928-29, and eight months later the Government Promissory Notes were sold in two lots.

The sale was made in order to enable the assessee to advance a loan of rupees one lac to one B. Udai Singh Jain of Aligarh. The assessee is found to have been investing his capital in Government Securities for a considerable number of years, and except for the securities in question the assessee has only once before made a sale of Government Securities, otherwise the assessee has held Government Securities until payment became due. The Assistant Commissioner held that for these reasons there was no business of purchase and sale of Government Securities, and the investments were not made in Government Securities for the purpose of earning any profits by selling the securities, but for the purpose of earning interest, and the sale was made because the loan was required. It is not possible for us to controvert the findings of fact which have been made. Learned counsel however, apparently argued that those findings of fact were arrived at under a misapprehension of law. The argument which the learned counsel addressed to us was based on the definition of "business" in Section 2 (4), Income Tax Act, and the provisions of Sections 4, 6 and 24. In Section 2 (4), Income Tax Act, "business" is defined as follows:

"'Business' includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

This definition is no doubt wide so far as the activities are mentioned which may be included under the term "business." A distinction is however drawn between "business" as so defined and receipts which are of a casual and non-recurring nature mentioned in Section 4 (3) (vii). This sub-section says that the Act does not apply to any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature. The question therefore is whether the profits or loss from sales of securities or shares would be of a casual and non-recurring nature, or whether they would be of the nature of business. The distinction is further shown by the fact that the Act itself is styled an Income-tax Act, that is, an Act which is to tax income, and not an Act which is to tax the gains of capital other than the interest or profits which accrue on the capital. In the Income-tax Manual in the comment on Section 4 (3) (vii), it is

stated that where A makes a practice of speculating in the purchase and sale of shares, his profits are liable to income-tax; that is, where there is a purchase with the intention of speculating. It is the intention with which the purchase is made which makes the difference. A man may either buy shares or securities with the object and intention of making a gain from the sale when these shares or securities have risen to a higher price, or he may purchase the shares or securities with the intention of keeping his capital safe and receiving meanwhile a certain amount of dividend or interest. The intention must be deduced from the facts and from the circumstances of the case. Where a man makes a business of speculating this will be deduced by the Court from the fact that he makes numerous purchases and sales, the sales being within a short time of the purchase.

On the other hand where a man makes few sales, although he may make a number of purchases, and where the sales are made at long intervals after the purchases, the conclusions to be drawn is that he is not indulging in the business of speculating in these stocks and shares, but that he is investing his capital in these stocks and shares. In this view of the law it appears to us that the Assistant Commissioner has not made any error in drawing his conclusions from the facts which he found. Accordingly we do not see that we can with any advantage call upon the Commissioner of Income Tax to state a case. We therefore dismiss this application with costs to the Crown, which we assess at Rs. 75. One month is allowed to the Crown Counsel to certify the amount of the fee.

Application dismissed.

[IN THE RANGOON HIGH COURT].

K. M. O. CHETTIYAR FIRM

v.

COMMISSIONER OF INCOME TAX, BURMA.

PAGE, C. J. and BA U, J.

January 31, 1934.

INCOME-TAX—PENALTY MAXIMUM AMOUNT—QUANTUM OF PENALTY—DISCRETION OF REVENUE AUTHORITIES—INCOME TAX ACT (XI OF 1922), SECTION 28.

The maximum penalty that can be imposed under Section 28 (1) of the Income Tax Act, is a sum representing the difference between the tax on the income declared by the assessee and the tax on the income ascertained under the Act in respect of which the assessment has been made and not the amount of tax on the concealed assessable income. The assessee fraudulently deducted Rs. 38,000 from the assessable income and showed a net loss of Rs. 31,751-12-3 in his return. He was assessed on an income of Rs. 50,000 under Section 23 (4), and a penalty of an amount representing the difference between the tax on Rs. 7,000 and the tax on Rs. 50,000 was imposed: Held, *that the imposition was not illegal.*

The quantum of penalty within the statutory limit that ought to be imposed is a matter of fact and not of law and is to be determined by the income-tax authorities and not by the Court.

In proceedings under Section 28, the income-tax authorities ought to act fairly and reasonably in the circumstances of each case.

Commissioner of Income Tax, Burma v. *A. A. R. Chettiyar Firm (1933 I.T.R. 285; I.L.R. 11 Rang. 75; 142 I.C. 758; A.I.R. 1933 Rang. 40), followed.*

Application under Section 66 (3) of the Indian Income Tax Act for an order requiring the Commissioner of Income Tax, Burma, to state the case to the High Court.

Darwood, for the petitioners.

Government Advocate, for the Commissioner.

JUDGMENT.

PAGE, C.J.—This application or a mandamus to the Commissioner of Income Tax, Burma, requiring him to state a case under Section 66 (3), Income Tax Act, is dismissed. The case turns upon the construction of Section 28 (1), Income Tax Act, which runs as follows :

"If the Income Tax Officer, the Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act is satisfied that an assessee has concealed the particulars of his income or has deliberately furnished inaccurate particulars of such income, and has thereby returned it below its real amount, he may direct that the assessee shall, in addition to the income-tax payable by him, pay by way of penalty a sum not

exceeding the amount of the income tax which would have been avoided if the income so returned by the assessee had been accepted as the correct income."

The question with respect to which the assessees invited the Court to order the Commissioner of Income Tax to state a case is:

"Whether in the present case the amount of income tax which would have been avoided if the income returned by the assessee had been accepted as correct was properly computed."

The material facts are that in respect of the 1931-32 assessment, by reason of the default of the assessees in making their return, it became necessary for the Income Tax Officer to estimate the income of the assessees liable to assessment under Section 23 (4), and in the course of the assessment proceedings:

"The Income Tax Officer discovered that the assessees had deliberately furnished inaccurate particulars of their income and had concealed portion of their income."

The return of income by the assessees purported to disclose a net loss of Rs. 31,751-12-3, and the Income Tax Officer, after making an enquiry into the matter, came to the conclusion that the assessees had: "deliberately carried to a misleading head of account certain sums amounting to many thousands of rupees."

In the event income tax was assessed upon an estimated income of Rs. 50,000. The Income Tax Officer then proceeded to impose a penalty upon the assessees under Section 28; and after appeals from the order of the Income Tax Officer had been presented to the Assistant Commissioner and to the Commissioner a penalty was finally imposed of an amount representing "the difference between the tax on Rs. 7,000 and the tax on Rs. 50,000." I will assume for the purpose of the present application that the question of law upon which it is now sought to obtain an order requiring the Commissioner of Income Tax to state a case arose in the course of the proceedings before the Assistant Commissioner.

Now, the income tax authorities in imposing a penalty upon the assessees under Section 28 acted in accordance with the

construction that has been placed npon the section in *Commissioner of Income Tax, Burma* v. *A. A. R. Chettyar Firm.* In that case it was held that :

" the maximum penalty that can be imposed under Section 28 (1) is a sum respresenting the difference between the tax on the income declared by the assessees and the tax on the income ascertained under the Income Tax Act in respect of which the assessment has been made."

The question which now falls to be determined is whether the construction that was placed on Section 28 in *Commissioner of Income Tax, Burma* v. *A. A. R. Chettyar Firm* was correct. It is common ground that the same meaning must be attributed to the term " income " for the purpose of construing the words " real amount " of income and " correct income " in Section 28, and the income tax authorities in the present case have treated the words " real amount " of the income and " correct income " as referring to assessable income. Applying that criterion the " real amount " of the assessable income in the present case is Rs. 50,000 and if the assessable income returned by the assessees had been accepted as the correct assessable income it would have been *nil*. It follows that the amount of income tax which would have been avoided if the assessable income returned by the assessees as *nil* had been accepted as the correct income is the difference between the income tax on no assessable income, that is, *nil*, and the income tax on the real assessable income which in the present case is to be taken as Rs. 50,000. In my opinion, the construction that was put upon Section 28 by the income tax authorities following *Commissioner of Income Tax, Burma* v. *A. A. R. Chettyar Firm* was correct.

I am not sure that I was able to appreciate the argument presented in support of the mandamus but I understood the contention on behalf of the applicants to be that the amount of the penalty cannot exceed the amount of the tax on the concealed assessable income. Of course, that is not the test that is laid down in the section as I construe it, but upon that hypothesis the learned advocate for the applicants argued that as the total income must be taken to be Rs. 50,000 and certain items

amounting to Rs. 38,000 were wrongly deducted from the assessable income returned, but nevertheless were disclosed, the maximum penalty could not exceed the amount of the tax on Rs. 12,000, *i.e*, the difference between Rs. 50,000 and Rs. 38,000. To dispose of this contention, which appears to be wholly fallacious, it is enough to say that it has been found by the income tax authorities, and it is not now disputed, that the assessees "deliberately furnished inaccurate particulars" in respect of the sum of Rs. 38,000 and thereby *pro tanto* the amount of the true assessable income was diminished. It follows therefore that if what I regard as this obviously erroneous construction of the section is adopted this sum of Rs. 38,000 is not to be deducted from the total amount of the assessable income for the purpose of ascertaining the maximum penalty that can be imposed.

As I have already stated however, I am of opinion that under Section 28 it is the duty of the income-tax authorities to estimate the amount of the penalty, if any that ought to be imposed upon contumacious or fraudulent assessees, but that in imposing the penalty, the maximum limit that is placed upon the *quantum* is that the penatly must not exceed the difference between the amount of the tax on the income assessable under the Act, and the amount of the tax upon the assessable income as returned by the assessees.

In the present case the Commissioner of Income Tax in the exercise of his discretion did not impose the maximum penalty, and in proceedings under Section 28, the income tax authorities ought to act fairly and reasonably in the circumstances of each case, as the Commissioner appears to have done in the present case. But the *quantum* of the penalty within the statutory limit that ought to be imposed is a matter of fact and not of law, and is to be determined by the income tax authorities, and not by the Court. For these reasons the application is dismissed with costs, ten gold mohurs. The applicants apply that the fee of Rs. 100 deposited under Section 66 (2) of the Act should be returned to them. The application is rejected.

BA U, J.—I agree.

Application rejected.

[IN THE ALLAHABAD HIGH COURT.]

BIRADHMAL LODHA

v.

COMMISSIONER OF INCOME TAX.

Niamatullah and Bennet, JJ.

November 3, 1933.

INCOME TAX—JOINT HINDU FAMILY—PARTIAL DIVISION OF PROPERTIES—APPLICABILITY OF SECTION 25-A—PLEA OF DIVISION—WHETHER CAN BE RAISED ON APPEAL—APPEAL—ASSISTANT COMMISSIONER'S POWER TO TAKE ADDITIONAL EVIDENCE—INCOME TAX ACT (XI OF 1922), SECTIONS 25-A AND 31.

In the case of a partial division of joint family property, Section 25-A of the Income Tax Act has no application. That section contemplates a case in which a disruption of the family occurs, so that the joint family as such ceases to exist.

The failure of the assessees to substantiate a claim that there was a partition of the joint family property, in an earlier year of assessment, will not preclude them from raising the point in a subsequent year of assessment.

Per BENNET, J.— *The plea that certain properties which had originally belonged to the joint family have been divided between the members must be raised at the time of making an assessment under Section 23; it cannot be raised for the first time on an appeal against that assessment. Section 31 (3) (b) of the Act only means that an assessment could be set aside on the ground that it is defective on the record as it stands and not that it should be set aside on the ground that new evidence, if heard and accepted, would prove that the assessment was defective.*

NIAMATULLAH, J.—*A plea of this nature should be taken by the assessees in the first instance by not including the income from the divided properties in the total income of the joint family in the return. And if this has been done the Assistant Commissioner could call for further evidence and enquire in the exercise of his power under Section 31 (2). This section gives unrestricted discretion to the Assistant Commissioner to make further enquiry, that is, to obtain more evidence throwing light on*

the question he has to decide, unlike O. 41, R. 27, C.P.C., which confers only very limited powers on a Court of appeal.

Case referred to:

SHIVA PRASAD GUPTA v. COMMISSIONER OF INCOME TAX [1929] (A.I.R. 1929 All. 819; 3 I.T.C. 406; 124 I.C. 467).

Case stated by the Commissioner of Income Tax under Section 66 (3) of the Income Tax Act (XI of 1922) [Miscellaneous Case No. 92 of 1933].

Tej Bahadur Sapru, Shankar Saran, Jyoti Sarup Gupta and *Jagannath Agarwal*, for the assessee.

K. Verma, for the Commissioner.

BENNET, J.—This is a miscellaneous income tax case in which an assessee made an application to this Court under Section 66 (3), Income-tax Act, and this Court framed five questions provisionally on the facts as stated by the assessee and required the Income Tax Commissioner to state a case. The Income Tax Commissioner has stated a case and the case has now been argued before this Court by learned counsel on each side. The first two questions which were framed by this Court provisionally were as follows:—

(1) Whether in the case of a partial division of a joint family property Section 25-A has any application? (2) Whether any failure on the part of the assessees to substantiate their claim on this point, in an earlier year of assessment, precludes them from raising the point in a subsequent year of assessment?

In regard to the second question the Income Tax Commissioner states that the assessees are not precluded from advancing a claim, and therefore there is no contest on this point, and we accept that view. On the first question the facts as stated are as follows:—

The assessees are a joint Hindu family carrying on business in the name of Kanwalnen Hamir Singh. The business is managed by Rai Bahadur Seth Biradh Mal Lodha, the *karta* of the joint family. Their head-quarters are in Ajmere, but money-lending and other transactions are carried on in other parts of British India and in Indian States. The joint family submitted a return for the income for the year 1927, to November 1928, on 10th September, 1929, for the year 1929-30. The return was

not accepted as correct by the Income Tax Officer because the extracts from the accounts showed that losses incurred outside British India had been deducted and income derived from dividends on shares of the Edward Mills, Beawar, had not been included. The assessees were therefore directed by notices under Sections 22 (4) and 23 (2), Income Tax Act, to produce account books or any other evidence on which they relied to substantiate their return. The assessees did appear before the Income Tax Officer and proceedings before the Income Tax Officer went on for over a year, and on 31st October, 1930, the Income Tax Officer assessed the income of the assessees including the dividends on shares in the Edward Mills, Beawar. It is in regard to these shares that the first question is framed. The facts stated by the Commissioner are as follows: In 1906 there were 392 shares purchased by the joint family with joint family funds and they were shown in the names of certain members of the joint family and of the *munim* as follows:

	Shares
Seth Gumau Mal	121
Rai Bahadur Seth Biradh Mal (the present Karta)....	113
Diwan Bahadur Umed Mal	21
Seth Gadh Mal	21
Seth Chand Mal	21
Seth Abhai Mal	85
Seth Choga Lal	10
Total	392

On 20th October, 1922, 315 shares were transferred to the names of various members of the joint family as follows:

	Shares.
Diwan Bahadur Seth Umed Mal (who was then Karta)	105
Seth Biradh Mal (the present Karta)	53
Seth Gadh Mal	52
Seth Kan Mal	53
Seth Jeth Mal	52
Total	315

and 76 shares were sold, and one share was given to charity. Up to 1926 the income from these shares was taken as part of the joint family income for the purposes of income tax assessment, and no objection was made. In the year 1927 the manager of the joint family made an objection to the inclusion of the income derived from these shares in the joint family income and notices were issued to the various members of the family to appear before the Income Tax Officer in order that an enquiry might be made. A letter dated 28th November, 1927, was received from the manager asking for a postponement and saying that he would later appear and explain in regard to the shares and that the members need not attend. He failed however to give any explanation or evidence, and on 16th January, 1928, the Income Tax Officer informed him that as the evidence required had not been given, the income from dividends of the Edward Mills will be treated as joint income. This was done for that year and for the two subsequent years and no objection was made by the assessees. As we have seen, in the year of which the assessment is in question, the return omitted this income, and the Income Tax Officer issued notices to the assessees to substantiate their return by the production of account books and other evidence. The order of the Income Tax Officer dated 31st October, 1930, making the assessment mentions: "Income shown less and detected on examinatian Rs. 35,918-10-8." This income apparently includes Rs. 24,906-9-1. But there does not appear to have been any claim advanced before the Income Tax Officer in regard to the dividends from the Edward Mills on this occasion, and there is no mention in his order that any such claim was made. The order is a long and detailed one and deals in detail with various items claimed by the assessees. There is no allegation in any affidavit of the assessees that the point was raised before the Income Tax Officer. The point was raised before the Assistant Commissioner of Income Tax on the appeal of the assessees, and he deals with the point and considers an affidavit which was produced by the assessees. He states that he was not satisfied with the evidence produced before him by the assessees, and he then adds that as the law of income tax stands he believes that he is not competent to make a decision. He refers to Section 25-A, Income Tax Act, and says:

"Under that section the claim that a partition has taken place must be made before the Income Tax Officer while he is making his assessment under Section 23 of the Act. It was improper for the assessees to raise this question for the first time in appeal, and as an appellate Court I am not competent to decide the question raised by them now."

Now it is contended for the assessees that Section 25-A will not cover the present case because Section 25-A refers to a partition among the members of the family and the Income Tax Officer has to be satisfied that a separation has taken place and that the joint family property has been partitioned among the various members or groups of members in definite proportions. I consider that that objection is correct and that Section 25-A does not refer to a case like the present where there is an allegation that there was no partition in the joint family but there was merely a division of a particular portion of the joint family property among the various members. Therefore, the answer to the first question is in the negative, and is that in the case of a partial division of a joint family property Section 25-A has no application. But I find it impossible to dispose of this portion of the case without framing a further question as follows:

(1-A) Should the plea that certain shares have been divided between the members of a joint Hindu family be raised at the time of making an assessment under Section 23 or can it be raised for the first time on an appeal against that assessment? When the first question was framed by the Bench of which I was a member, we stated quite definitely, as shown on p. 35 of the printed book, that:

"It appears therefore that on this part of the case two questions of law might arise. We say 'might arise' because we shall have to find ultimately, on the facts to be found by the Commissioner for our benefit, what are the actual points of law that do arise in the case."

Section 66 (5) lays down: "The High Court upon the hearing of any such case shall decide the questions of law raised thereby." This shows that it is open to this Court when hearing the case on the statement of the Commissioner to decide what are the questions of law which arise, and in fact that has been

held in the ruling reported in *A.I.R.* 1929 *All.* 819. In the present case when the first question was framed there was nothing to show that the objection had not been taken by the assessees before the Income Tax Officer, and therefore no question was framed on that point. The additional question which I have noted as arising was read out by me to learned counsel for the assessees at the time of his argument, and he had an opportunity of meeting that question. No further statement of the case appears necessary on this point as the facts appear to be clear. Much argument was made by learned counsel that the Assistant Commissioner had based his rejection of the objection solely on the ground of Section 25-A. But Section 25-A is not the only point to which his order refers, and he has definitely stated: "It was improper for the assessees to raise this question for the first time in appeal." All that Section 25-A provides is that a claim which comes under that section should be made at the time of making an assessment. Although the present claim does not come under Section 25-A it appears to me that it is also a claim which must be made at the time of making an assessment. Under the Civil Procedure Code it is not open to a party on appeal to advance a claim for relief on a ground which he has not taken in his plaint, and even as regards the production of new evidence it is laid down by O. 41, R. 27, that additional evidence can only be admitted in appeal where such evidence is required by the appellate Court itself in order to enable it to pronounce judgment, or where such evidence has been refused by the Court of first instance. If the civil Courts are so stringent in regard to the rule that new matters should not be raised for the first time in appeal, why should it be laid down that appeals under the Income Tax Act should be conducted with greater laxity. In the present case, as already stated, the assessees sent a return which did not include the income from the shares in the Edward Mills, Beawar. Under Section 23 (2) the Income Tax Officer considered that the return was incomplete on this ground, and this was one of his reasons for issuing a notice to the assessees under Section 23 (2) "to produce account books or any other evidence on which they relied to substantiate their return." That a notice under Section 23 (2) was issued is shown by the statement of the case, paragraph 2,

and is admitted by the assessees in the petition to the Court, page 25, paragraph 5. I consider that in reply to this notice the assessees should have raised the plea that the shares had been divided between the members of the family, and they should have produced evidence to support that plea. The return was submitted on 10th September, 1929, and the assessment order of the Income Tax Officer was made on 31st October, 1930, more than a year later so that there was ample time to make the plea and produce the evidence. The necessity for evidence on this point had been brought to the notice of the assessees by the order of the Income Tax Officer dated 16th January, 1928, on page 38 of the paper book. This was in connection with a plea on the point raised on the assessment for the year previous to the year now under consideration.

An allegation like the claim in regard to the Edward Mills is an allegation of fact which requires evidence to prove it, and it is an allegation which should obviously be made before the Income Tax Officer at assessment, when he has issued a notice under Section 23 (2) calling on the assessees to prove the correctness of their return which has omitted the dividends from these shares. The allegation should be followed up with evidence to prove it. But the order of the Assistant Commissioner on page 17 states that the question was raised by the assessees for the first time on appeal. I consider that this question (1-A) arises because when this Court has decided that the Assistant Commissioner was not correct in holding that Section 25-A barred the question being raised before him in the appeal, the question remains whether the question should or should not be raised before him in the appeal. I do not consider that the Assistant Commissioner should be left to decide this for himself without guidance on the point of law by this Court. It is the questions of law raised by the case which this Court decides under Section 66 (5), and not the questions of law raised by the statement of the case. This is especially so in cases like the present where the statement was applied on the direction of this Court which tentatively framed certain questions. In other words, the questions did not arise on the statement, but the statement arose on the questions. The fundamental question of law on this part of the case is whether the

plea raised by the assessees for the first time on appeal can or should be entertained on appeal and the question cannot be fully decided by the mere finding that the particular reason given by the Assistant Commissioner was not correct.

It is true that Section 31 (3) (*b*) does give the Assistant Commissioner hearing an appeal power to order further enquiry. But this is in case he sets aside the assessment and directs the Income Tax Officer to make a fresh assessment:

"after making such further inquiry as the Income Tax Officer thinks fit or the Assistant Commissioner may direct."

I consider that the section means that the assessment could be set aside on the ground that it is defective on record as it stands, and not that it should be set aside on the ground that new evidence if heard and accepted would prove that the assessment was defective. It is only after the assessment is set aside that further enquiry would be made, for the purpose of making a fresh assessment. But apart from this view of the wording of Section 31 (3) (*b*), I consider that on general principles of the law of procedure the question is one which in the circumstances of the present case should not be entertained by the Assistant Commissioner in appeal. The assessees had ample opportunity to raise the matter before the Income Tax Officer; the order of the Income Tax Officer in the previous year had given them ample notice that the Income Tax Officer expected evidence to be supplied on such a matter; and the Income Tax Officer had issued a notice to them under Section 23 (2) putting them to the proof of the correctness of their return which omitted the income from these shares. When in the face of all this the assessees neglect to produce any evidence on the point before the Income Tax Officer, I consider that they should not be allowed to raise the matter for the first time on appeal and expect that a further opportunity will be afforded to them to produce evidence. It will of course be open to the assessees to raise the matter before the Income Tax Officer, at the time of assessment in any other year, and it is somewhat remarkable that they do not state that they have done so. But I consider that there must be some finality to the enquiries into the facts for a particular year, and I consider that the stage for enquiry was passed when the question was raised. My answer to question (1-A) is that under

the circumstances of this case the claim could not be raised for the first time in appeal.

The third and fourth questions are as follows: (3) Whether there was any evidence before the Income Tax department for the conclusion that the sum of Rs. 36,000 and odd represents profits derived by the assessees from transactions in British India? (4) If the profits mentioned in question No. (3) be regarded as profits received from transactions that took place in British India, whether the losses incurred in respect of the business at Tonk, Saronj, Jodhpur and Shahpura shops should not also be regarded, as a matter of law, as losses incurred in transactions that took place in British India?

In regard to these questions the statement of the case is that the firm of the joint family has numerous branches in various Indian States. In four of these branches, Jaipur, Alwar, Nimbhera and Kotah, the Income Tax Officer assessed an income of Rs. 36,055-12-9. The statement proceeds that the Jaipur and Kotah branches alone had from transactions in British India received more than this total sum. The question No. (3) was "Whether there was any evidence before the Income Tax department for this conclusion?" The statement of the Commissioner refers to the account books of the Jaipur branch and those of the assessees' Calcutta, Bombay and Ajmere branches. He states that some years ago certain amounts were transferred from the headquarters branch at Ajmere to Kotah and Jaipur branches. Afterwards it was found that this capital could be more profitably utilised in financing transactions in Calcutta and Bombay, and it was therefore transferred from the Kotah and Jaipur branches to the Calcutta and Bombay branches. The Calcutta and Bombay branches pay the interest which is earned on this capital to the Kotah and Jaipur branches. The evidence for this is the books of the Calcutta, Bombay and Jaipur branches where these sums are clearly shown. Now some confusion arose from a consideration of how this income has been treated under the Act. This income comes under Section 4 (1) which lays down that the Act applies to all income, profits or gains, accruing, or arising, or received in British India. The interest on this capital accrues and arises in British India, that is, in Calcutta and Bombay, and therefore the Act applies to this income.

The answer to this question (3) therefore is in the affirmative. The question No. (4) asked whether as a rule of law if the profits in question No. (3) be regarded as profits which took place in transactions in British India, the losses incurred in respect of the business at Tonk, Saronj, Jodhpur and Shadpura shops should not be regarded as losses in transactions which took place in British India ? Learned counsel for the assessees did not attempt to maintain this proposition, and it is obvious that the answer must be in the negative. The losses in the shops in these Indian States are not shown to have any connection with British India, and no income from these shops, had been brought into British India and assessed under Section 4 (2).

The last question No. (5) is as follows : Whether, in the circumstances of the case, the Assistant Commissioner was right in law in refusing to investigate the claim as to payment of interest on deposits alleged to have been made in the business Hamir Singh Samir Mal by members of the family and relations not members of the family ?

The question raised here is very similar to the question which I have raised in 1-A. There is a branch of the main family business carrying on business at Ajmere styled Hamir Singh Samir Mal. The assessees made a claim to the Assistant Commissioner on appeal that certain members of the joint family acting in their individual capacity and also some relatives had deposited their private money with this firm, and that the amount of interest paid on these deposits should be allowed as a deduction fron the income derived by the joint family from this branch of their business. The return filed by the assessees for this shop Hamir Singh Samir Mal showed Rs. 84,709-2-0 on the credit side and on the debit side Rs. 4,656-1-0. This latter figure included six items of interest paid to various ladies. These particular deductions were allowed by the Income Tax Officer. Under Section 22 (3), Income Tax Act, a person who has furnished a return and subsequently discovers any omission in it can furnish a revised return at any time before the assesssment is made. The assessees had sent their return on 10th September, 1929, and the assessment was not made till more than a year later, on 31st October, 1931, but the assessees did not apply at any time before the Incone Tax Officer to correct their return.

It was not until the case came on appeal before the Assistant Commissioner that the assessees put forward this claim to the large amount of Rs. 84,216-15-6 as interest paid by the firm which should be allowed as a deduction. Now under Section 31 (2) the Assistant Commissioner may before the disposal of any appeal make such further enquiry as he thinks fit or cause further enquiry to be made by the Income Tax Officer. It is claimed by learned counsel for the assessees that the Income Tax Commissioner did not entertain this claim. If such a claim could be entertained on appeal, then it was a matter for the discretion of the Income Tax Commissioner whether he should entertain this claim or not and make any further enquiry, but as I have stated in regard to question 1-A, I consider that such claims cannot be legally made on appeal. The Assistant Commissioner was of the same opinion and he stated: "The claim cannot now be entertained by me." He also referred to Section 25-A and said that the claim should have been made before the Income Tax Officer. I think he was correct in refusing to entertain the claim. At the most it can be said that it was a matter for the discretion of the Income Tax Officer, that he exercised his discretion against the assessees and that he refused to make further enquiry on appeal. My answer therefore to the last question is in the affirmative.

As regards the question of costs I consider that the applicants have only succeeded on a technical point in regard to the first question, and that the real point of substance in the matter is the question 1-A on which the assessees fail. The second question was not contested by the Commissioner. In my view therefore the applicants have failed in this reference, and I hold that they are not entitled to any relief arising from the decision which I give on these questions. I therefore consider that in view of the applicant's success only on the question of Section 25-A, the assessees shall pay three-fourths of the costs of the opposite party who will pay one-fourth of the costs of the assessees. I would assess the fees of the learned counsel instructed by the Commissioner at Rs. 250.

NIAMATULLAH, J.—I have had the advantage of perusing the order which my learned brother proposes to pass, and find

myself in agreement with him unreservedly in answering question No. 3 in the affirmative and No. 4 in the negative.

Questions Nos 1 and 2 relate to the same matter and should be disposed of together. The facts bearing on those questions are as follows :

The assessees form a joint Hindu family with its principal place of business at Ajmere. Among other properties it owned 392 shares in the Edward Mills, Beawar, standing in the names of the various members of the family and its munim. It is not disputed by the assessees that the shares formed part of the joint family property till 20th October, 1922, when, it is alleged by them, they were transferred by the jonit family to some individual members, each of whom was to hold a number of shares as his separate property. In spite of this alleged arrangement, the income derived from these shares was included as part of the income of joint family property for the purpose of assessment of income tax. No objection was raised by the assessees or any individual member thereof till 1926, when the "karta" of the family objected to the inclusion of the dividend as part of the income derived from the family property. Notices were issued to certain members of the family demanding their presence before the Income Tax Officer for the purpose of an enquiry into the correctness or otherwise of the objections preferred by the "karta." No appearance was however entered by any of them, but the "karta" undertook to satisfy the Income Tax Officer on the point. He however took no further steps. The income derived from the shares was treated for assessment purposes as the income derived from joint family property. In two subsequent years the dividend was similarly treated in the assessment of tax payable by the joint family. It does not appear whether in these two years the return furnished by the assessees, included the income derived from the shares or whether the Income Tax Officer himself added it to the income of the family shown in the return or ascertained by him.

This case relates to the assessment for the year 1929-30. It is not disputed that for this year the assessees did not show the dividends as part of the income derived from the family property. Income Tax Officer however, obtained correct figures from the Edward Mills and included the same for the purpose of

assessment of super-tax. No question as regards income tax payable in respect of the income derived from the shares could arise, because it had been paid at the source. The account books of the joint family were produced before the Income Tax Officer probably after notice under Section 23 (2), Income Tax Act, was served on the assessees requiring them to produce evidence in support of their return. The Income Tax Officer included the dividend as part of the family property.

In appeal to the Assistant Commissioner from the assessment made by the Income Tax Officer they objected and alleged that the shares did not belong to the joint family but to certain individual members as their separate property. The Assistant Commissioner refused to entertain these pleas on the ground that Section 25-A, Income Tax Act, was a bar to the question being raised in appeal. In this connection he referred to what had been done in previous years. His order was upheld by the Commissioner, who refused to state a case for adjudication by this Court. On an application by the assessees, this Court framed among others, questions Nos. 1 and 2, which run as follows:

"(1) Whether in the case of a partial division of a joint family property Section 25-A has any application? and (2) whether any failure on the part of the assessees to substantiate their claim on this point, in an earlier year of assessment, precludes them from raising the point in a subsequent year of assessment?"

The Commissioner has conceded, in the statement of the case, that question No. 2 should be answered in the negative. He is rightly of opinion that the assessees are not precluded from raising a question which has so far not been decided on the merits. It is not necessary, in these circumstances, to take any further notice of question No. 2. The first question appears to be based on the assumption that the assessees' objection amounted to an averment that a "partial partition" had taken place in the family of the assessees. To avoid possible confusion arising from the use of that expression, it should be mentioned that what the assessees alleged in substance was that the shares originally belonging to the joint family had been transferred to individual members thereof, each of whom was to hold the shares allotted to him as his separate or self-acquired property

without introducing any change in the constitution of the family which continues to be a coparcenary body. In one sense, it may be considered to be a partial partition in so far as that part of the family property has been divided among the members of the joint family, apparently not in equal shares—a point which is quite immaterial. In another sense, the transaction, if in fact it took place, amounted to no more than a transfer by the joint Hindu family of the shares to certain persons, who were to hold the same in their individual capacity, and not as members of the joint family. The essence of the matter is that the shares ceased to belong to the joint family as such. Whether the transaction be styled as one of partial partition of the family property or as transfer of part of the family property, Section 25A, Income Tax Act, does not, in my opinion, apply. That section contemplates a case in which a disruption of the family occurs, so that a joint family, as such, ceases to exist and no property previously belonging to it retains the character of joint family property. It is immaterial whether it is divided by metes and bounds or is held in defined shares. This is perfectly clear from the language employed in Section 25A (1), which provides that :

"Where at the time of making an assessment under Section 23 it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income Tax Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied that separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or groups of members in definite portions, he shall record an order to that effect."

What the section contemplates is "a separation of the members of the family," which implies that the status of certain members undergoes a change. In other words, they cease to be members of the joint family. It is an elementary rule of Hindu Law that a mere declaration of an intention to separate brings about a disruption of the family, at any rate, so far as the member making the declaration is concerned. Partition of the joint family property by metes and bounds is not a necessary requirement of the disruption of the family. If the properties re-remain intact, but the separating member's share in them is

defined, they are nevertheless considered to have been "partitioned." Partition contemplated by Section 25A is not necessarily a partition by metes and bounds. This view finds further support from the proviso to sub-section 2, which runs as follows:

"Provided that all the separated members and groups of members shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such."

In cases in which members of a joint Hindu family agree to divide among themselves a particular family property, leaving their status and the rest of the family property as before, they cannot be considered to be "separated members." In spite of a partial partition of the kind assumed, they continue to remain members of the same joint family possessed of joint family property left after the disposition of a part. For these reasons I am of opinion that Section 25A was not applicable to the circumstances disclosed by the assessees' objection taken before the Assistant Commissioner, and I answer the first question in the negative. My learned brother, who has answered question No. 1 in the manner I have done, proposes to frame an additional question, which he has called 1-A, and which runs as follows:

"Should the plea that certain shares have been divided between the members of a joint Hindu family be raised at the time of making an assessment under Section 23 or can be raised for the first time on an appeal against that assessment."

I do not dispute the proposition that the High Court should decide questions of law raised by the statement of the case, though any particular point may not have been put in the form of a definite question, provided the statement of the case shows that such a question arises on the face of it and calls for decision. I do not think such is the case before us. The Assistant Commissioner based his decision solely on his view of Section 25A. I am unable to say what view he would have taken if he had read Section 25A as we have done. The Assistant Commissioner, who heard the appeal and before whom the assessees categorically stated their objection, declined to entertain it on the ground

that Section 25A debarred him from giving effect to the objection. His view was—and it is based on Section 25A—that, as separation had not been alleged before the Income Tax Officer, the assessees were not entitled to raise it at a subsequent stage, and that the Assistant Commissioner, sitting in appeal, was not "competent" to entertain it. If Section 25A had been applicable, the Assistant Commissioner's refusal to entertain the objection would have been probably right, because Section 25A directs the Income Tax Officer to make an enquiry into the alleged separation after giving notice to the other members concerned. In other cases Section 31 (2) clearly empowers the Assistant Commissioner :

"to make such further inquiry as he thinks fit, or cause further inquiry to be made by the Income Tax Officer, before disposing of any appeal before him."

It is impossible for us to say that, if the Assistant Commissioner had not considered himself to be debarred from entertaining the assessees' objection, he would not have decided the question, if necessary, by making further enquiries into the truth or otherwise of the allegations made by the assessees. It should be borne in mind that the Income Tax Act contains no rules of pleadings of the nature prescribed by the Code of Civil Procedure. All that it requires an assessee to do is to make a return of "his total income during the previous year": (see Section 22). On receipt of this return, the Income Tax Officer may accept it or call for proof (Section 23). In the present case, it is not disputed that the assessees had not shown the income derived from the shares as part of the income of the joint family property. In any case, their return clearly indicated that they did not regard the income derived from the shares as part of the joint family property. The Income Tax Officer understood as much. Under Section 23 (2), Income Tax Act, it was the duty of the Income Tax Officer, if he thought, as he apparently did, that the return was incorrect in that respect, to call for proof of the fact that the shares had ceased to be part of the joint family property. He issued a notice under Section 23 (2), but it does not appear that he called for proof on the specific question whether the shares had ceased to be part of the family property. He however ascertained from the company the amount of

dividend paid and added it to the income shown in the return. The company's register showed that the shares belonged to certain individuals and not to a joint family. The assessees do not appear to have produced any evidence other than their own account books and what appeared from the company's register showing that the shares did not stand in the name of the joint family.

The Income Tax Officer should be deemed to have found that the shares still belonged to the joint family, as he included the dividend as part of the income of the family. The question was pointedly raised before the Assistant Commissioner, who refused to adjudicate on it on the materials before him or to make any enquiry, in the view he took of Section 25A. We shall not be justified if we assume that the Assistant Commissioner would have found against the assessees or would have refused to exercise his powers under Section 31 (2), even if he held, like ourselves, that Section 25A had no application. On the contrary, I am inclined to think that a responsible officer like the Assistant Commissioner who is to look not only to the interests of public finance but is also to administer justice as between the Crown and its subjects, would have adjudicated on the question and, if necessary considered the question whether further enquiry was necessary. The question raised by the assessees is of some importance and shall have to be decided sooner or later. The assessees alleged that these shares were not part of the family property and stood in the names of individuals in their own rights. It may be that this arrangement was legitimately arrived at by the members of the family, or it may be that it was a fraud on income-tax law and that the family is still the owner of the shares in question, deriving income therefrom, and the alleged transfer to individual members is sham and fictitious. As to whether the dividends were credited in the account books as income of the joint family is a piece of evidence of some value. The Assistant Commissioner did not apply his mind at all to this aspect of the case as he thought, erroneously to our minds, that Section 25A debarred him from doing so. My view on this part of the case proceeds on the assumption that the Assistant Commissioner based his order exclusively on Section 25A. The Assistant Commissioner's judgment relevant to this point is as follows:

"It is admitted by the appellants that the Edward Mills shares were originally held by the undivided family as such. When part of the property of the undivided family was transferred to certain members of that family in their individual capacity, the undivided family became divided in respect of part of its property, though in respect of the remainder of its property the joint status was retained. Now the procedure to be followed when a Hindu undivided family becomes divided (whether in respect of part of its property or all its property is immaterial) is laid down in Section 25A, Income Tax Act. Under that section the claim that a partition has taken place must be made before the Income Tax Officer while he is making his assessment under Section 23 of the Act, and any order of the Income Tax Officer under Section 25A is appealable to the Assistant Commissioner of Income-tax under Section 30. In the present case no application under Section 25A was made to the Income Tax Officer by the assessees and no order under Section 25A was passed by the Income Tax Officer. It was improper for the assessees to raise this question for the first time in appeal, and as an appellate Court I am not competent to decide the question raised by them now. I may however observe that in my opinion the Income Tax Officer was correct, in the absence of any application under Section 25A, in regarding the dividends of the Edward Mills shares as part of the income of the joint family. He would only be justified in regarding the dividends of the Edward Mills shares as part of the income of the members of the family in their individual capacity if he had satisfied himself, after inquiry into a claim under Section 25A, that the alleged partition had, in fact, taken place."

I have quoted practically the whole of the order of the Assistant Commissioner on this point to show conclusively that he based it solely on Section 25A. The sentence "it was improper for the assessees to raise this question for the first time in appeal" should not be divorced from its context. What precedes and what follows it leaves no room for doubt that the impropriety attributed to the assessees consisted of their omission to raise the question which according to the Assistant Commissioner, they should have raised under Section 25A before the Income Tax Officer.

In the circumstances explained above I do not think that question No. 1-A formulated by my learned brother arises. I would have merely answered the questions referred to us and disposed of the reference without expressing any opinion on the question which properly falls within the jurisdiction of the Assistant Commissioner, who should decide for himself whether, assuming Section 25A does not apply the assessees should have done more than what they did before the Income Tax Officer; whether on the materials before him any finding, and if so what finding, can be arrived at on the question, namely, whether the shares are part of the family property; and whether the Assistant Commissioner should, in the exercise of his discretion, make such further enquiry as he thinks fit under Section 31 (2). But as my learned brother has recorded his views on the question raised by him, I answer it as follows: The plea that the shares have been divided should have been taken by the assessees, in the first instance, by not including the income derived from them in the total income of the joint family shown in the return. This was done. They should have produced evidence in support of the return when they were served with notice under Section 23 (2). Their own account were before the Income Tax Officer, who had also access to the register of the company showing that the shares did not stand in the name of the joint family as such. An enquiry by the Assistant Commissioner could not be claimed as of right; but the Assistant Commissioner could call for further evidence and enquire in the exercise of his power under Section 31 (2). In this case the Assistant Commissioner has not considered the question on the merits nor did he refuse to enquire into it under Section 31 (2). He could have recorded a finding on the evidence already produced and could have called for more.

I may note that no analogy can be drawn from Order 41, Rule 27, Civil Procedure Code, to determine the powers of the Assistant Commissioner hearing an appeal under the Income Tax Act, Section 31 (2), as the latter gives unrestricted discretion to the Assistant Commissioner to make further enquiry, that is, to obtain more evidence throwing light on the question which he is called upon to decide; while Order 41 Rule 27 confers very limited powers upon a Court of appeal in the matter of admitting fresh evidence.

The only question that remains to be considered is question No. 5. The facts are that the assessees had shown in their return a sum of Rs. 4,000 odd as interest paid by the joint family. The Income Tax Officer made an allowance to that extent. In appeal before the Assistant Commissioner a deduction of income-tax was claimed on no less than Rs. 80,000 odd alleged to have been paid to individual members of the joint family as interest on sums deposited by them. In other words the correctness of their return was repudiated. The Assistant Commissioner refused, in these circumstances, to investigate this belated and inconsistent claim. He had a discretion to do so; and no error of law can be imputed to him. In this view I answer the 5th question in the affirmative. I agree with my learned brother as regards costs.

Reference answered.

[IN THE RANGOON HIGH COURT.]

COMMISSIONER OF INCOME TAX, BURMA

v.

K. A. R. K. FIRM.

Page, C.J., Das and Mya Bu, JJ.

July 10, 1933.

INCOME TAX—MONEY-LENDING FIRM—PURCHASE OF PROPERTY IN LIEU OF LOAN—VALUATION OF ASSETS PENDING RECONSTITUTION OF FIRM—ESTIMATED LOSS OF CAPITAL VALUE —WHETHER ALLOWABLE DEDUCTION.

Where a money-lending firm was reconstituted during the accounting year and, having regard to an impending change in the constitution of the firm, a valuation of the assets of the firm was made and the firm claimed deduction of a sum of Rs. 34,561 which represented the estimated loss of the capital value of the immovable property which the firm had acquired in the ordinary course of business in repayment of loans: Held, *that the sum of Rs. 34,561 was not a trading loss which had accrued in the accounting year but was merely the estimated depreciation in value of the assets based on a revaluation and it could not therefore be deducted from the profits for purposes of income-tax.*

Where immovable property is received by a money-lending firm in repayment of a loan during the accounting year, unless and until that property is sold or otherwise disposed of for value there can be no realised trading loss in respect of such property during the accounting year.

Case stated by the Commissioner of Income Tax, Burma, under Section 66 (2) of the Income Tax Act (XI of 1922): Civil Reference No. 10 of 1933.

The facts are stated in the judgment of Page, C. J.

A. Eggar, for the Commissioner of Income Tax.

N. M. Cowasji and *Daniel*, for the assessee.

PAGE, C. J.—In this case the K.A.R.K. Chettyar Firm, carrying on business as money-lenders in Pyu in the Toungoo District, was assessed for the year 1931-32 upon the profits and gains of the firm in the accounting year 1930-31. By a partnership agreement executed on 16th July, 1930, the firm was newly constituted, an additional partner being taken into the firm which previously had consisted of five partners. Thereafter the business was carried on by the six partners, the shares of the new partner being different from the shares of the five partners in the old firm. The assessment upon the firm and the partners under Section 26A, Income Tax Act, was based on the profits of the business that had been earned during the accounting year. Now, at the time when the firm was reconstituted a valuation of the assets of the business had been made but, as was pointed out by the assessees in a note to the Assistant Commissioner of Income Tax explaining the grounds of the appeal to him from the Income Tax Officer this was only a valuation of the stock and property forming the assets of the old firm. The old firm possessed *inter alia* immovable property which was acquired by it in the ordinary course of business. This property was let out on lease, and taxable profits in the form of rent accrued therefrom to the assessees. The assessees now claim to be entitled to deduct from the trading profits in the accounting year a sum of Rs. 34,561 as being a trading loss. This sum of Rs. 34,561 represents the estimated loss of the capital value of the immovable property under the valuation to which reference has been made.

For the purpose in hand it is immaterial whether the business is treated as having remained the property of the original partnership or as having been transferred to the new partnership, and we express no opinion upon that question. It must not be taken however, that as at present advised we should be prepared to differ from the view taken by the Commissioner of Income Tax that the effect of the transaction was that a new firm was constituted. The sole question that arises in the present reference is whether this sum of Rs. 34,561 was a trading loss realised during the accounting year. It does not purport to be anything of the sort, and the valuation upon which it is based was not made for the purpose of ascertaining the trading loss of the business during the accounting year, but for the purpose of obtaining a revaluation of the assets of the business having regard to the impending change in the constitution of the firm. Further, no evidence was adduced in respect of the immovable property which is alleged to have decreased in value to the extent of Rs. 34,561 that there was any realized loss of profit during the accounting year or afterwards. In the assessment order a deduction is allowed for the loss resulting from the sale of a house during the accounting year and it appears that the practice of the Income Tax Authorities in connexion with such assessments as that under consideration, where immovable property is received during the accounting year in repayment of a loan by the assessee, is that if during the year the property is sold and the proceeds of the sale are less than the loan the repayment of which they represent, the difference is allowed as a trading loss in the business of the assessee. Unless and until property taken in repayment of loans is sold or otherwise disposed of for value there can of course be no realized trading loss in respect of such property during the accounting year. In my opinion this sum of Rs. 34,561, in the circumstances disclosed in the present case, was not a trading loss which accrued during the accounting year, but was the estimated depreciation in the value of the assets of the firm based upon a revaluation of such assets made for the purpose, and on the occasion, of the reconstitution of the firm.

For these reasons, in my opinion, the answer to the question propounded is in the negative. Costs ten gold mohurs.

DAS, J.—I agree.

MYA BU, J.—I agree.

Reference answered.

[IN THE ALLAHABAD HIGH COURT.]

MAHARAJ KUMAR OF VIZIANAGARAM, *In re.*

January 30, 1934.

NIAMATULLAH and BENNET, JJ.

INCOME TAX—IMPARTIBLE ESTATE—ALLOWANCE RECEIVED BY JUNIOR MEMBER—WHETHER EXEMPT FROM INCOME TAX AND SUPER TAX—'SUM RECEIVED AS MEMBER OF HINDU UNDIVIDED FAMILY'—'AGRICULTURAL INCOME'—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 4 (3) (viii) AND 14 (1)—MADRAS IMPARTIBLE ESTATES ACT (II OF 1904), SECTION 4.

Under a deed of trust executed by the late Maharaja of Vizianagaram, the holder of an impartible estate governed by the Madras Impartible Estates Act, 1904, the assessee, his younger son, was given a monthly allowance of Rs. 5,000. The next Maharaja enhanced the amount of maintenance payable to the assessee to Rs. 10,000 a month. The Income-tax authorities levied income-tax and super-tax on the sum of Rs.1,20,000 which the assessee had received in the year 1931-1932. The assessee claimed that this amount was exempt from tax under Section 14 (1) of the Income Tax Act as it was an allowance received by him as a member of an undivided Hindu family and that it was also exempt under Section 4 (3) (viii) as it was agricultural income. On a reference by the Commissioner: Held, *that the junior member of an impartible Hindu Raj must be considered to be a member of an undivided Hindu family in the absence of evidence to show that he had separated; there was also a presumption that as a junior member of the family he was entitled to receive maintenance from the income of the family; and the amount of Rs. 1,20,000 received by the assessee was therefore, not liable to income-tax or super-tax in view of the exemption contained in Section 14 (1) of the Income Tax Act, unless it was shown by the Income Tax Department that the assessee was not entitled by*

the custom of the particular Raj to any maintenance out of the income of the Raj. Held, *further, that if the allowance was not received by the assessee as a member of a Hindu undivided family it was not exempt from tax as agricultural income under Section 4 (3) (viii) of the Act, inasmuch as the immediate source of the income to the assessee was not the original source through which the estate received the money but the bounty or gift of the estate.*

KISHEN KISHORE *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1933] (1 I. T. R. 143; I. L. R. 14 Lah. 255; 141 I. C. 415; A.I.R. 1933 Lah. 284), *distinguished.*

Cases referred to :—

BAIJNATH PRASAD SINGH *v.* TEJ BALI SINGH [1921] (I.L.R. 43 All. 228; 48 I.A. 195; 60 I.C. 534).

GANGADHARA RAMA RAO *v.* RAJAH OF PITTAPORE [1918] (I. L. R. 41 Mad. 778; 45 I. A. 148; 23 C. W. N. 173; 47 I. C. 354).

SARTAJ KUARI *v.* DEORAJ KUARI [1888] I. L. R. 10 All. 272; 15 I.A. 51).

SHIBA PRASAD SINGH *v.* PRAYAG KUMARI [1932] (I.L.R. 59 Cal. 1399; 138 Ind. Cas. 861; 63 M.L.J. 196; A. I. R. 1932 P. C. 216; 36 C. W. N. 1046).

VENKATA SURYA MAHIPATI RAMA KRISHNA RAO *v.* COURT OF WARDS [1899] (I. L. R. 22 Mad. 383; 26 I. A 83; 1 Bom. L. R. 277; 3 C. W. N. 415).

Tej Bahadur Sapru, K. N. Katju and *Shah Jamil Alam*, for the assessee.

K. Verma, for the Commissioner of Income Tax.

JUDGMENT.—This is a Reference by the Commissioner of Income Tax under Section 66 of the Income Tax Act. The assessee is Maharaj Kumar of Vizianagaram, the younger brother of the present Maharaja of that estate and the second son of the late Maharaja who died in 1922. The question that has been submitted for decision by this Court is as follows :—

"Whether on the facts of the case, the amount of Rs. 1,20,000 received annually by the assessee from the Vizianagaram Raj is liable to income-tax and super tax or is exempt

either under Section 14 (1) of the Act or Section 4 (3) (viii) thereof as being agricultural income ? "

The facts to which reference has been made in question are as follows :—

The late Maharaja of Vizianagaram executed a deed of trust on October 28, 1912. The deed provided that the trustee, Mr. Flower, who was to take over the possession and management of the estate *in praesenti* should pay off the debts then due from the Maharaja, that the heir-apparent should become the immediate beneficiary for whom the trustee was to manage the estate and that the estate should be made over to the beneficiary on his attaining the age of 21. The deed reserved a sum of Rs. 25,000 a month, besides certain other benefits which need not be mentioned, for the Maharaja himself. It also provided that the younger son, the present assessee, should receive an allowance of Rs. 5,000 a month on attaining majority. The deed of trust was given effect to, and so far as the record shows the Maharaja Kumar was in receipt of the allowance fixed for him by the deed. The assessee attained majority in 1924 or 1925. By a deed dated February 11, 1928, the present Maharaja, the elder brother of the assessee, enhanced the amount of maintenance of the assessee to Rs. 10,000 a month. The Maharaja Kumar has since settled down in Benares in these provinces and owns certain other properties besides his allowance. He was required by the Income Tax Department to make a return of his income for the year 1931-32. The return which he made showed a sum of Rs. 20,317, as his total assessable income. He did not include the sum of Rs. 1,20,000 received by him in that year as his allowance under the deed of trust and the deed of settlement to which reference has already been made. The Income Tax Officer sent back the return asking him to include the sum as part of his assessable income. He complied with the demand for making a fresh return but objected to the inclusion of his allowance as part of his assessable income. The Income Tax Officer made an assessment on his total income including the Rs. 1,20,000. His appeal to the Assistant Commissioner was unsuccessful. The Commissioner of Income Tax has made the present reference at his instance.

The question which the Commissioner was required by the assessee to refer to this Court for decision were four. The Commissioner thought they had been inartistically framed and did not adopt them for reference to this Court. He framed the question which we have quoted above and which he thought covered all the points which the assessee desired to raise. As will appear from a subsequent part of our judgment the question framed by the Commissioner does not include an important aspect of the case which was the subject-matter of question No. 2 framed by the assessee. Taking the question framed by the Commissioner, it will appear that it can be divided into two distinct issues: (1) Whether the assessee is exempt from payment of income-tax on the sum of Rs. 1,20,300 received by him as his allowance from the Vizianagaram estate under Section 14 (1) of the Income Tax Act, and (2) whether that sum, being part of the agricultural income of the estate, is exempt from taxation under Section 4 (3) (viii)? Section 14 (1) of the Income Tax Act referred to in the first issue runs as follows:—

"The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

The case put forward on behalf of the assessee is that he and the Maharaja are members of an undivided Hindu family and that the allowance of Rs. 10,000 a month received by him is paid to him as a member of that family. The Commissioner of Income Tax, on the other hand, maintains that the assessee can in no sense be considered to be a member of a joint Hindu family with the present Maharaja as, firstly, he is separate in food and residence, and secondly, the Vizianagaram estate is an impartible estate which descends on a single heir who is, in this case, the present Maharaja. The Commissioner has not expressed any opinion on the further question whether, assuming that the assessee is a member of an undivided Hindu family, the allowance received by him is a payment made to him as a member of that family. This is set out in the assessee's second question but is not covered in the question framed by the Commissioner. In the course of the arguments before us that point assumed considerable importance and was discussed by learned counsel on both sides at length.

It is clear to us that Section 14 (1) can apply only if two conditions are made out. The assessee should establish that he is a member of a Hindu undivided family and further that the sum in question has been received by him as such. It seems to us that the relation of cause and effect must exist between the position of the assessee as a member of a Hindu undivided family and the receipt by him of the sum which is in question for the purpose of assessment. If a person who is a member of a Hindu undivided family received an allowance not because he is such a member but wholly apart from that position Section 14 (1) does not apply. It is only if the assessee has received the sum in question by virtue of his position as a member of the undivided family to which he claims to belong, that the application of Section 14 (1) is attracted.

The Commissioner disposed of the whole controversy on the short ground that the assessee "lives separately at Benares" and "messes separately." We areclearly of opinion that the question arising in the case cannot be decided solely with reference to the manner in which the assessee and the Maharaja are leading their lives. The fact that one lives in Vizianagaram and the other lives in Benares is not inconsistent with their being members of an undivided Hindu family. It is not disputed by the assessee that the Vizianagaram Raj is an impartible estate which descends upon a single heir. It is, on the other hand, not disputed by the Income Tax Department that it is an ancestral estate which has been in the family for several generations. The characteristics of such an estate have been the subject of numerous judicial decisions including a number of rulings of their Lordships of the Privy Council. We may refer to the latest case on the point in *Siva Prasad Singh* v. *Prayag Kumari*. After referring to the well-known dictum that custom supersedes the general law so far as it goes but the latter prevails for all purposes outside the custom, their Lordships observe as follows :—

" Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance and (4) the right of survivorship. The first of

these rights cannot exist in the case of an impartible estate though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Sartaj Kuari* v. *Deoraj Kuari* and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards*; and so also the third as held in *Gangadhara Rama Rao* v. *Rajah of Pittapore*. To this extent the general law of Mitakshara has been superseded by custom and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. The right, therefore, still remains and this is what was held in *Baijnath Prasad Singh* v. *Tej Bali Singh*. To this extent the estate still retains its character of joint family property and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights, which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains. Nor is this right a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate, has ceased to be joint it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship."

According to this theory of the rights of junior members of a family possessed of an ancestral impartible Raj every son acquires by birth a right to the estate and becomes the member of a joint Hindu family with the holder of the estate. But for the custom of impartibility he would be entitled to all the rights of a member of a joint family which the Hindu Law gives him including the right to demand partition and to participate in the enjoyment of the income of the estate. The custom has superseded the Hindu Law to the extent indicated by their Lordships. The junior members remain members of an undivided family and the custom does not supersede the general law as far as

their status is concerned though their rights to demand partition and to participate in the income of the estate is taken away. Where any one of them is entitled by custom to maintenance out of the income of the estate he is to that extent entitled to participate in the enjoyment of the undivided estate.

In the estates which are governed by the Madras Impartible Estates Act, 1904 (Madras Act No. II of 1904), the legislature has imposed certain limitations on the power of the holder of an impartible estate. Vizianagram Raj is one of the estates to which that Act applies. Section 2 (3) defines the proprietor of an impartible estate as meaning a "person who is entitled to possession thereof as single heir under the special custom of the family or locality in which the estate is situated or, if there be no such family or local custom, under the general custom regulating the succession to impartible estates in Southern India." Section 4 provides: "The proprietor of an impartible estate shall be incapable of alienating or binding by his debts, such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debts incurred under circumstances which would entitle the managing member of a joint Hindu family not being the father or grandfather of the other coparceners, to make an alienation of the joint property or incur a debt binding on the shares of the other coparceners independently of their consent." Taking the attributes of an impartible Raj with the provisions of the Madras Impartible Estates Act of 1904, it will appear that junior members in the Vizianagaram family have not only a right to succeed by survivorship as declared by their Lordships of the Privy Council in the case to which reference has already been made, but have a right to control the actions of the ruling Maharaja in making alienations and incurring debts. In so far as Section 4 imposes certain limitations on the powers of the proprietors of impartible estates to which it applies, it improves the position of the junior members of the family. In case of improper alienations the junior members can sue for setting aside such alienations. The proprietor of the impartible estate cannot incur debts except within the limits allowed to a karta of a joint Hindu family subject to the Mitakshara law. It follows that unless a disruption of the Vizianagaram family has taken place, the assessee, as a member of that family having acquired

a right in the ancestral property by birth cannot but be considered to be a member of a Hindu undivided family within the meaning of Section 14 (1) of the Income Tax Act. The learned Advocate for the Income Tax Commissioner strongly relied upon certain observations occurring in cases which are all referred to in the latest judgment of the Privy Council mentioned above. It is argued that in families possessing impartible properties the right of a junior member as a member of an undivided Hindu family is recognised for one solitary purpose, namely, that he has a chance to succeed by survivorship. It is pointed out that the proprietor of the estate has full power to deal with the income arising therefrom in any manner, he can likewise divert the succession to the property by will and can otherwise alienate and that junior members of the family cannot of right claim separate maintenance. In the first place all these attributes are not possessed by impartible estates which though ancestral are subject to the Madras Impartible Estates Act, 1904. In the second place the question before us is one of status and not one of the extent to which a junior member is entitled to participate in the income accruing from the ancestral property and to challenge the acts of the holder thereof. Even in an ordinary joint Hindu family governed by Mitakshara the rights of junior members are somewhat limited, though having regard to his right to claim partition he can insist on enjoyment of the joint family property to a far greater extent than a member of a joint Hindu family possessed of impartible property. It cannot be disputed that since a younger son of the proprietor of an impartible Raj acquires an interest by birth he acquires the position of a member of an undivided family, even though his rights do not extend to a power to claim partition and to restrain the actions of the proprietor. He will cease to be a member of such an undivided family only if, to use the words of their Lordships of the Privy Council already quoted, he "renounces his right of succession to the estate." It is not suggested that the present assessee has ever indicated expressly or by necessary implication that he renounced his right as a member of the undivided Hindu family to which he undoubtedly belonged when he was born. Separate residence and separate messing to which great importance has been attached by the

Income Tax Commissioner may be some of the indicia by which the joint character or otherwise of a family may be ascertained but in case of members of wealthy families they are not only inconclusive but of little evidential value. For these reasons we hold that the assessee must be considered to be a member of a Hindu undivided family, of which the other member is the present Maharaja of Vizianagaram.

The next question is whether the amount of Rs. 10,000 a month which assessee is in receipt of can be considered to be income received by him as a member of the undivided family to which he belongs. As already mentioned, if the sum be considered to be in the nature of a gift, pure and simple, by the assessee's father and brother it cannot be characterised as income received by a member of a Hindu undivided family as such. The Commissioner of Income Tax has not addressed himself to this aspect of the case though it was contemplated in the second question formulated by the assessee. It seems to us that if the assessee was, by custom applicable to the Vizianagaram estate, entitled to be maintained with the revenue of the estate and if the allowance fixed for him by his father and brother is in satisfaction of his right to be so maintained he should be considered to have received it as a member of a Hindu undivided family. Ordinarily every junior member of an undivided family possessed of impartible property is not of right entitled to claim maintenance in the absence of custom to the contrary. In each case a junior member claiming to be entitled must establish a custom to that effect. The quantum of proof will however, vary with the position of the claimant. It the case of a younger son, his right of maintenance from the holder of the impartible Raj has been so often asserted and recognised that a Court is entitled to presume that such a right exists. In *Gangadhara Rama Rao* v. *Rajah of Pittapore*, which was a case in which the son of the adopted son of the last proprietor of an impartible estate claimed maintenance from the succeeding holder of the estate under a will, their Lordships of the Privy Council observed as follows:—

" This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zemindari. Just as the impartibility is the creature of custom, so custom may and does

affirm a right to maintenance in certain members of the family. No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zemindari. That by itself in the case of some claims would not be fatal. When a custom or usage whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading. Analogy may be found in instances in the law merchant or in certain customs in copyhold tenure. In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible zemindari has been so often recognised that it would not be necessary to prove the custom in each case."

In the case before their Lordships the right of maintenance was negatived for two reasons namely, firstly, because the plaintiff did not claim a right of maintenance on the ground of relationship with the holder of the impartible Raj and secondly that he was not the son or such near relation of the holder of the impartible Raj in whose favour a customary right of maintenance could have been presumed, having regard to the notoriety of such usage. In the case before us the general observation made by their Lordships of the Privy Council and quoted above fully applies. *Prima facie* and in the absence of proof to the contrary the younger son of the late Maharaja, as the assessee is, was of right entitled to be maintained out of the income of the impartible property. The assessee is not receiving any other allowance for maintenance. It is permissible to infer that the Maharaja recognised his right and fixed it in the then circumstances of the estate at Rs. 5,000 a month. Subsequently his brother raised it to Rs. 10,000, probably in view of the improved resources of the estate on which the amount must necessarily depend.

The learned Advocate for the Income Tax Commissioner relied on certain cases in which allowances paid to widows were held to be separately taxable. This class of cases is quite different from the case before us, as widows cannot be regarded as members of an undivided Hindu family within the meaning

of Section 14 (1), Income Tax Act. On the same ground the case of *Kishen Kishore* v. *Commissioner of Income Tax, Punjab*, is distinguishable. The learned judges who decided that case definitely held that the assessee was separate. In their view the assessee had accepted the allowance and severed himself from the family. The allowance could not be considered as part of the family property so as to make the holder of the impartible property liable for the income-tax. In the case before us the allowance is part of the income of the Raj and the tax is payable at the source.

For these reasons we answer the first part of the question referred to us as follows:—

The amount of Rs. 1,20,000 received annually by the assessee from the Vizianagaram Raj is not liable to income-tax and super-tax unless it is shown by the Income Tax Department that the assessee was not entitled by custom to any maintenance out of the income of the Raj.

We have added a qualification to the answer which we propose to give to the reference because the right of the assessee to receive maintenance from the income of the Raj depends upon proof of custom applicable to the estate. As already held, the custom is of such notoriety that it should be presumed in case of a younger son. The presumption, however, is not conclusive but can be rebutted. It is open to the Income Tax Department to offer proof that such a custom does not exist in this family. As this aspect of the case was not present to the mind of the Income Tax Officer or the Assistant Commissioner we reserve to the department the liberty of proving if they can, the absence of the custom, which we have presumed in favour of the assessee.

As to whether the allowance received by the assessee is exempt under Section 4 (3) (viii) said to be part of the agricultural income of the estate, our answer is in the negative. If the allowance is not received by the assessee as a member of an undivided Hindu family his source is not the original source through which the Vizianagaram estate received the money. His immediate source is the bounty or gift by the estate in which case it cannot be considered to be agricultural income and cannot be exempt from income-tax under Section 4 (3) (viii).

For the reasons stated above we answer the question referred to us in the manner indicated above. The assessee shall have his costs of this reference. We fix counsel's fees on each side at Rs. 5,000.

Order accordingly.

[IN THE JUDICIAL COMMISSIONER'S COURT OF SIND.]

COMMISSIONER OF INCOME TAX, BOMBAY

v.

BULCHAND KESHAVDAS.

July 19, 1933.

Rupchand, J. C., and Mehta, A. J. C.

INCOME TAX—APPEAL TO PRIVY COUNCIL—ORDER REQUIRING COMMISSIONER TO STATE CASE ARISING OUT OF ORDER REFUSING REGISTRATION OF FIRM—LEAVE TO APPEAL—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 66A.

Where the Commissioner of Income Tax applied for leave to appeal to the Privy Council from an order of the Judicial Commissioner's Court requiring him to refer to that Court certain questions of law arising out of an order of an Income Tax Officer refusing to register certain persons as a firm, on the ground that an order refusing registration as a firm was a final order and the Judicial Commissioner's Court had no jurisdiction to require the Commissioner to state the case : Held, *that the case was a fit one in which leave should be granted under Section 66A of the Act to appeal to the Privy Council.*

Cases referred to :—

BULCHAND KESHAVDAS *v.* COMMISSIONER OF INCOME TAX, BOMBAY [1930] (128 I.C. 678; A.I.R. 1930 SIND 301).

RAMLAL MURLIDHAR, *In re* [1931] (I. L. R. 58 CAL. 1005; 134 I.C. 1056; A.I.R. 1931 CAL. 682).

JUDGMENT.—We think that this is a fit case in which leave should be granted under Section 66A of the Income Tax Act,

to the Commissioner of Income Tax to enable him to appeal to His Majesty in Council. He challenges the jurisdiction of this Court to have compelled him to refer certain questions of law for opinion under Section 66 (3) of the Act. His case is that an order passed by the Income Tax Officer refusing to register the opponents as a firm for the purposes of the Act on the ground that the agreement produced by them was not an instrument within the meaning of Section 2, Clause (14), of the Act is a final order and such order may only be reviewed by the Income Tax Officer himself or be interfered with in revision by the Commissioner of Income Tax; and that therefore any question of law arising out of the decision of the Income Tax Collector refusing registration cannot be made a ground either of appeal to the Assistant Commissioner of Income Tax or be made a subject of a reference to this Court. The point raised by the Commissioner of Income Tax does not appear to have been dealt with by any other Court. The reason for holding a view contrary to that expressed by him is contained in the judgment given by this Court on July 25, 1930. However strong we may feel as to the correctness of the reasons given by this Court on the point in issue, it is possible that their Lordships of the Privy Council might come to a different conclusion. If the law permits the Commissioner of Income Tax to have the judgment of this Court examined by their Lordships of the Privy Council, there is no reason why this request should not be granted. It is rather unfortunate that the Commissioner of Income Tax should have asked for leave to appeal to His Majesty in Council on the point of jurisdiction in the present case when he does not seem to challenge the correctness of the advice given to him on the specific questions of law which were ordered to be referred. As a matter of fact on the specific question of law answered by this Court a view somewhat similar to that taken by this Court has since been taken by the Calcutta High Court in *In re Ramlal Murlidhar* [58 Cal. at p. 1007]. In that case his Lordship the Chief Justice has referred to the Judgment of this Court in the following words:

" We have been referred to a decision of the Court of the Judicial Commissioner of Sind: *Bulchand Keshavdas* v. *Commissioner of Income Tax*. Mr. Roy had adopted the observation

of the Additional Judicial Commissioner, Mr. Rupchand, in that case as part of his argument. It appears to me that the reasoning of the learned Judicial Commissioner supports the view which I have expressed."

It would also appear that it is hardly likely that the appeal filed by the Commissioner of Income Tax will be defended. The registration of the partnership instrument was thrown out *in limine* on the ground that the partnership instrument was signed by the working partners only. The Income Tax Authorities have still got the right of throwing out this instrument on the merits. Under the circumstances the opponents stand to gain very little by incurring heavy expenditure of engaging Counsel to appear for them before their Lordships of the Privy Council. But these considerations are in my opinion not sufficient to deprive the Commissioner of Income Tax of his right to have the leave asked for. We accordingly grant him the necessary certificate under Section 66A on the usual terms.

Certificate granted.

[IN THE LAHORE HIGH COURT.]

KANGRA VALLEY ESTATE CO., LTD., *In re.*

Jai Lal and Munroe, JJ.

June 28, 1933.

INCOME TAX—REFERENCE—FORM OF STATEMENT OF CASE—COMMISSIONER'S DUTY TO CONSIDER POINTS RAISED BY ASSESSEE—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 66 (2)—LAHORE HIGH COURT RULES 11 AND 12.

Under the Rules of the Lahore High Court regarding applications under Section 66 (2) of the Income Tax Act if the Commissioner receives within the prescribed time any suggestions

from the assessee as to the nature of the questions to be referred he should not settle the final form of the statement of the case without reference to those suggestions.

Reference under Section 66 (2) of the Indian Income Tax Act, by the Commissioner of Income Tax, Punjab and N. W. F. P.

Badri Das and *Sohan Lal*, for the assessee.

J. N. Aggarwal, for the Commissioner of Income Tax.

ORDER.—This is a reference to this Court by the Commissioner of Income Tax under Section 66 (2) of the Income Tax Act (XI of 1922). The Commissioner of Income Tax prepared a draft statement of the case and sent it to Rao Bahadur Bakhshi Sohan Lal. On July 4, 1932, Bakhshi Sohan Lal wrote a letter to the Commissioner pointing out that certain facts had not been fully stated, setting out those facts and pointing out that certain documents had been produced and to these documents there was no reference in the statement of the case prepared by the Commissioner. Under the rules regarding applications under the above-mentioned section, it is the duty of the Commissioner to settle the case in its final form only if no suggestion, addition or amendment is received by him within fourteen days, but if a question does arise in the statement of the case it is clearly, from the wording of Rule 12, his duty to decide whether he and the assessee are able or unable to agree. If they are able to agree, of course, no difficulty arises, and provisions are made by the rule of what should happen if they are unable to agree.

Instead of carrying out the instructions contained in Rule 12, the Commissioner in this case settled the case in its final form without regard to the points raised in the letter of July 4, 1932, and so far as the information before us is, without any further communication to Rao Bahadūr Bakhshi Sohan Lal. In these circumstances no course is open to us but to send the case back to the Commissioner in order that he may comply with Rules 11 and 12 of the rules regarding the applications, and this we do, awarding to the assessee Rs. 32, costs of to-day, irrespective of the final result of this reference.

Case sent back.

[IN THE RANGOON HIGH COURT.]

COMMISSIONER OF INCOME TAX, BURMA.

v.

C. P. L. E. CHETTIYAR FIRM.

Page, C. J., Das and Sen, JJ.

March 7, 1934.

INCOME TAX—REFERENCE—APPLICATION TO REQUIRE COMMISSIONER TO STATE CASE—JURISDICTION OF HIGH COURT TO REQUIRE COMMISSIONER TO REFER QUESTIONS NOT DULY RAISED BY ASSESSEE BEFORE COMMISSIONER—RIGHT TO APPLY FOR MANDAMUS—INCOME TAX ACT (XI OF 1922), SECTION 66, SUB-SECTIONS (2) and (3).

The High Court has no jurisdiction, on an application by an assessee under sub-section (3) of Section 66 of the Income Tax Act, to order the Commissioner of Income Tax to state a case and refer any question of law for consideration by the High Court which the assessee has not duly required the Commissioner to refer under sub-section (2) of the said section.

Obiter : *Since the enactment of the Income Tax Act of 1922 the assessee is not entitled to apply under Section 45 of the Specific Relief Act for an order in the nature of a mandamus requiring the Commissioner to state a case and refer a question of law, because a specific and adequate remedy in that behalf is available to the assessee under sub-sections (2) and (3) of Section 66 of the Income Tax Act.* Quære : *whether it is open to the Crown to apply to the Court in a proper case for an order in the nature of a mandamus requiring the Commissioner to state a case and refer a question of law under sub-section (1) of Section 66.*

Cases referred to :

A. K. A. C. T. V. CHETTIYAR FIRM v. COMMISSIONER OF INCOME TAX [1928] (I. L. R. 6 Rang. 492; 113 I. C. 810; A. I. R. 1928 Rang. 281).

ALCOCK ASHDOWN & CO. *v.* CHIEF REVENUE AUTHORITY, BOMBAY [1923] (50 I. A. 227; I.L.R. 47 Bom. 742; 75 I.C. 392; A. I. R. 1923 P. C. 138).

CALEDONIAN RAILWAY CO. *v.* BANKS [1881] (1 Tax Cas. 487).

COMMISSIONER OF INCOME TAX *v.* MAHARAJADHIRAJ OF DHARBHANGA [1933] (60 I. A. 146; 1933 I. T. R. 94; I. L. R. 12 Pat. 318; A.I.R. 1933 P.C. 108.)

COMMISSIONER OF INCOME TAX *v.* NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. [1931] (I.L.R. 55 Bom. 637; 134 I.C. 555; 1932 Comp. Cas. 1; 33 Bom. L. R. 807.)

COMMISSIONER OF INCOME TAX *v.* P.K.N.P.R. CHETTIYAR FIRM [1930] (I L.R. 8 Rang. 209; 125 I.C. 344; A. I. R. 1930 Rang. 78.)

E. M. CHETTIYAR FIRM *v.* COMMISSIONER OF INCOME TAX [1930] (I. L. R. 8 Rang. 435; 127 I.C. 473; A. I. R. 1930 Rang. 274.)

ISHAR DAS DHARAM CHAND, *In re* [1926] (92 I. C. 249; A.I.R. 1926 Lah. 168.)

KAJORIMAL KALYANMAL *v.* COMMISSIONER OF INCOME TAX [1930] (122 I.C. 741; A.I.R. 1930 All. 209.)

LALLA MAL HARDEODAS COTTON SPINNING MILLS, *In re* [1924] (I.L.R. 46 All. 1; 75 I.C. 339; A.I.R. 1924 All. 137.)

MAKHAN LAL RAM SARUP, *In re* [1925] (86 I. C. 27; A.I.R. 1925 All. 298.)

NORTH STAFFORDSHIRE RAILWAY CO. *v.* EDGE [1920] (A.C. 254; 89 L.J.K.B. 78; 122 L.T. 385.)

RADHEY LAL BALMUKUND, *In re* [1931] (I.L.R. 52 All. 991; 130 I.C. 634; A.I.R. 1931 All. 23.)

S. A. SUBBIAH AIYAR *v.* COMMISSIONER OF INCOME TAX [1930] (I. L. R. 53 Mad. 510; 127 I.C. 131; A. I. R. 1930 Mad. 449).

SEIN SENG HIN *v.* COMMISSIONER OF INCOME TAX [1925] (89 I.C. 785; A.I.R. 1925 Rang. 252.)

SHIVA PRASAD GUPTA *v.* COMMISSIONER OF INCOME TAX [1929] (124 I. C. 467; A.I.R. 1929 All. 819.)

THIRUVENKATA MUDALIAR *v.* COMMISSIONER OF INCOME TAX [1928] (110 I.C. 742; A.I.R. 1928 Mad. 889; 66 M.L.J. 19.)

TRIKAMJI JIVANDAS *v.* COMMISSIONER OF INCOME TAX [1925] (I. L. R. 4 Pat. 224; 86 I.C. 170; A. I. R. 1925 Pat. 352.)

TRUSTEES CORPORATION (INDIA) LTD. v. COMMISSIONER OF INCOME TAX [1930] (57 I.A. 152; I. L. R. 54 Bom. 437; 123 I.C. 177; A.I.R. 1930 P.C. 151.)

Government Advocate, for the Commissioner of Income Tax.

PAGE, C. J.—Pursuant to an order of the High Court under Section 66 (3), Income Tax Act, dated 27th July, 1933, the Commissioner of Income Tax has propounded the following questions for determination by the Court: (1) where the Commissioner of Income Tax has refused to state a case under Section 66 (2), has the Court jurisdiction, under Section 66 (3), to require the Commissioner to state a case in respect of a further question of law which appears to the Court to have arisen in the course of the assessment? (2) whether, in making an assessment under Section 34 the Income Tax Officer is entitled to assess sources of income in respect of which an assessment has already been made? The answer to the first question depends upon the true construction of Section 66 (3), Income Tax Act. Section 66 (2) and (3) runs as follows:

"66 (2). Within sixty days of the date on which he is served with notice of an order under Section 31 or of Section 32 or of the making of a decision by a Board of Referees under Section 33-A the assessee in respect of whom the order or decision was passed may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order or decision, and the Commissioner shall, within sixty days of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court: Provided that, if, in exercise of his power of revision under Section 33 the Commissioner decides the question, the assessee may withdraw his application, and if he does so, the fee paid shall be refunded.

(3) If, on any application being made under sub-section (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may, within six months from the date on which he is served with notice of the refusal, apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it, and, on receipt

of any such requisition, the Commissioner shall state and refer the case accordingly."

The material facts necessary for the purpose of disposing of the present case are set out in the order of the Commissioner of 15th December, 1932:

"The assessees' 1929-30 assessment was first made under Section 23 (3) on an income of Rs. 19,889 of which Rs. 18,889 was income from business. In the course of the next year's assessment, the Income Tax Officer found that the income from certain investments of the assessees had not been shown in the accounts produced. He therefore reopened the 1929-30 assessment under Section 34. In the notice issued under that section, he stated that he proposed to assess the income from business and investments which had practically escaped assessment. The Income Tax Officer also called for the headquarters' accounts. As these were not produced, he made the re-assessment under Section 23 (4), and determined the assessees' income to be Rs. 31,000, of which Rs. 30,000 was the income from business. On appeal, the assessment was upheld.

The assessees under Section 66 (2) duly applied to the Commissioner, requiring him to refer to the High Court three questions of law which the assessees contended arose out of the order of the Assistant Commissioner. The Commissioner, for reasons upon which it is not necessary to enter, refused to state a case in respect of these three questions, and at the hearing of the subsequent application for a mandamus under Section 66 (3) the assessees did not press for an order of the Court requiring the Commissioner to state a case in respect of any of these questions. It appears that the assessees had also applied to the Commissioner in an application, which admittedly was presented outside the time limit prescribed under Section 66 (2), requiring him to refer to the High Court two further questions of law which the assessees alleged arose out of the order of the Assistant Commissioner: (1) On a true construction of Section 34 of the Act and in the circumstances whether the assessment under Section 23 (4) is valid? (2) Whether the Income Tax Officer was justified in law in holding to the contrary when the burden of proof required by the assessee has been substantially rebutted? It is unnecessary to discuss either the

of any such requisition, the Commissioner shall state and refer the case accordingly."

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The assessees under Section 66 (2) duly applied to the Commissioner, requiring him to refer to the High Court three questions of law which the assessees contended arose out of the order of the Assistant Commissioner. The Commissioner, for reasons upon which it is not necessary to enter, refused to state a case in respect of these three questions, and at the hearing of the subsequent application for a mandamus under Section 66 (3) the assessees did not press for an order of the Court requiring the Commissioner to state a case in respect of any of these questions. It appears that the assessees had also applied to the Commissioner in an application, which admittedly was presented outside the time limit prescribed under Section 66 (2), requiring him to refer to the High Court two further questions of law which the assessees alleged arose out of the order of the Assistant Commissioner: (1) On a true construction of Section 34 of the Act and in the circumstances whether the assessment under Section 23 (4) is valid? (2) Whether the Income Tax Officer was justified in law in holding to the contrary when the burden of proof required by the assessee has been substantially rebutted? It is unnecessary to discuss either the

form or the substance of these questions, because the Commissioner refused, and, in my opinion, rightly refused, to state a case or to refer either of these questions for determination by the High Court, upon the ground that the application requiring him to refer these questions was out of time. The assessees then applied to the High Court under Section 66 (3), for an order requiring the Commissioner to state a case and refer these two questions for the determination of the High Court. At the hearing of the application for the mandamus it was conceded that the assessees were not entitled to apply for an order requiring the Commissioner to refer either of these two questions, because admittedly the application in that behalf had been presented to the Commissioner out of time. It is to be observed that in future different considerations will arise in this connexion, having regard to the provisions of Act XVIII of 1933, Section 28 (*d*) and (*e*). On behalf of the assessees, however, it was contended that the Court had power, under Section 66 (3) or Section 66 (1) to order the Commissioner to state a case and refer any question of law which the Court was of opinion arose out of the order of the Assistant Commissioner or Commissioner under Section 66 (2), notwithstanding that such question of law was not duly raised before either the Assistant Commissioner or Commissioner and was one which, having regard to the fact that the provisions of Section 66 (2) had not been complied with, the assessees were not entitled to require the Commissioner to refer.

Upon this question there is a conflict of opinion in the High Courts in India. The Rangoon High Court in *A. K. A. C. T. V. Chettiar Firm* v. *Commissioner of Income Tax*, and *Commissioner of Income Tax* v. *P. K. N. P. R. Chettiar Firm*, the Madras High Court in *P. Thiruvenkata Mudaliar* v. *Commissioner of Income Tax, Madras* and *S. A. Subbiah Ayyar* v. *Commissioner of Income Tax, Madras*, the Lahore High Court in *In the matter of Ishar Das Dharam Chand* and the Allahabad High Court in *In the matter of Lalla Mal Hardeo Das Cotton Spinning Mills*, *In the matter of Makham Lal Ram Sarup* and *In the matter of Radhey Lal Balmukand*, see also per Dawson Miller, C. J., in *Thrikamji Jiwandas* v. *Commissioner of Income Tax, Bihar and Orissa*, have held that the Court has no such power. On the

other hand a Bench of the Allahabad High Court composed of the same two Judges (Mukerji and Niamatullah, JJ.) in *Shiva Psasad Gupta* v. *Commissioner of Income Tax, U. P.*, and also in *Messrs. Kajorimal Kalyanmal* v. *Commissioner of Income Tax*, have taken the contrary view. The decision of the Allahabad High Court in *Shiva Prasad Gupta* v. *Commissioner of Income Tax, U. P., and Messrs. Kajorimal Kalyanmal* v. *Commissioner of Income Tax, U. P.*, has been followed by the Bombay High Court in *Commissioner of Income Tax, Bombay* v. *National Mutual Life Association of Australasia, Ltd.*

I am clearly of opinion that the Court has no jurisdiction, on an application by an assessee under Section 66 (3), to order the Commissioner of Income Tax, to state a case and refer any question of law for consideration by the High Court which the assessee has not duly required the Commissioner to refer under Section 66 (2). In *E. M. Chettiyar Firm* v. *Commissioner of Income Tax*, (at p. 439 of I.L.R. 8 Rang.) I have occasion to observe that :

"The object and effect of Sections 66 and 66-A, Income Tax Act, 1922, was to provide special machinery whereby the Commissioner or the assessee should be enabled to obtain the opinion of the High Court upon any question of law arising in the course of the assessment. The jurisdiction with which the High Court is invested under the Income Tax Act, 1922, however, is of an exceptional nature, and I apprehend that the intention of the legislature in enacting Sections 66 and 66-A was to provide that the only procedure available for obtaining a reference by way of case stated should be that prescribed under those sections."

Under Section 51 of the earlier Income Tax Act (VII of 1918) an assessee desirous of obtaining the opinion of the Court upon a question of law which arose in the course of an assessment upon him must needs, pursuant to Section 51 (1) of that Act, file an application under Section 45, Specific Relief Act : *Alcock Ashdown & Co., Ltd.* v. *Chief Revenue Authority, Bombay*. But since the enactment of the Income Tax Act of 1922, in my opinion, he is no longer entitled to have recourse to Section 45 Specific Relief Act, but must proceed under Section 66 (2) of the Act of 1922, which now includes also orders of the Commis-

sioner under Section 33: see Act XVIII of 1933, Section 28 (*a*) (*b*) and (*c*). For the purpose of disposing of the present case it is unnecessary to determine whether it is open to the Crown to apply to the Court in a proper case for an order in the nature of a mandamus requiring the Commissioner to state a case and refer a question of a law under Section 66 (1) of the Act, but I am clearly of the opinion that the assessee has no such right, and cannot file an application for that purpose under Section 45, Specific Relief Act, or otherwise, because a " specific and adequate legal remedy " in that behalf is available to the assessee under Section 66 (2) and (3), Income Tax Act: *Sein Seng Hin* v. *Commissioner of Income Tax, Burma.* The opinion expressed by Mukerji and Niamatullah, JJ., in *Shiva Prasad Gupta* v. *Commissioner of Income Tax, U.P.* and in *Messrs. Kalyanmal Kajorimal* v. *Commissioner of Income Tax, U. P.*, that on an application for a mandamus under Section 66 (3) it is "for the High Court to find out what is the point of law that arises and requires decision," with all respect to those learned Judges, appears to me to be wholly untenable. I apprehend that the scheme of Section 66 is that in a case stated, either under Section 66 (1) or Section 66 (2), the Commissioner shall set out sufficient facts to raise the specific question of law which in his own view arises under Section 66 (1), or in the view of the assessee arises under Section 66 (2). In either case the Commissioner must state in the case what his own opinion is on the question of law in respect of which the case is stated. If the Commissioner refuses to state a case when duly required to do so under Section 66 (2) it is open to the assessee to apply to the Court under Section 66 (3) for an order requiring the Commissioner to state a case and refer the question of law to which his application refers. But, in my opinion, under Section 66 (3) the Court at the hearing of an application by the assessee under Section 66 (3) has seizin only of such questions of law as have duly been raised by or before the Commissioner and upon which the Commissioner has expressed his opinion. The ambit of Section 66 (3) is not wider than that of Section 66 (2).

It was not, and could not have been, intended, I think, that the Court, on an application by an assessee under Section 66 (3) should be bound, or at liberty, to formulate the questions of law

that arise as Mukerji and Niamatullah, JJ., decided in the cases to which reference has been made. The result of acceding to such a contention would be that any assessee who is dissatisfied with the assessment that has been made upon him would be able to require the Commissioner to refer to the High Court any alleged question of law however absurd, under Section 66 (2), on the chance that the Court itself, at the hearing of the application for mandamus under Section 66 (3) might be able to unearth some point of law which had not been raised before the Commissioner and upon which the Commissioner had never had an opportunity of expressing his opinion. That, I apprehend, could not have been the object, and is not the effect of Section 66 (3) of the Act; and the view that I have expressed as to the true construction of Section 66 would seem to find support in the following observations of Lord Macmillan when delivering the judgment of the Board in *Commissioner of Income Tax, Bihar and Orissa* v. *Maharajahdhiraja of Darbhanga* at p. 160 (of 60 *I. A.*):

"The Commissioner unfortunately omitted to formulate any question of law arising out of this transaction. The duty of the High Court under Section 66, sub-section 5 is to decide the questions of law raised by the case referred to them by the Commissioner, and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the question to be decided. * * Their lordships deprecate this departure from regular proceedings, but in the circumstances have not thought it proper to decline to express their view on the question thus informally presented."

I would add that, although the provisions of the corresponding section of the English Income Tax Act (8 and 5 Geo. 5 Ch. 40, Section 149) are different from those contained in Section 66, Indian Income Tax Act, and the construction of Section 66 must depend upon a consideration of the language in which that section is couched, it may not be inapposite to refer in this connexion to the judgments in *Caledonian Ry. Co.* v. *Banks* and *North Staffordshire Ry. Co.* v. *Edge* which were decided respectively by the Court of Exchequer in Scotland and the High Court in England. It is necessary, I think, to draw attention once more to the following observations of Lord

Blanesburgh, when delivering the opinion of the Privy Council in *Trustees Corporation (India) Ltd.* v. *Commissioner of Income Tax, Bombay Presidency*:

"Their lordships are fully alive to the circumstances in which the High Court was constrained to direct that these further questions should be referred to it for consideration and the result in the present case of the order then made merely serves to confirm the view of the Board that the High Court will, in future cases, be well advised to require before they seek to entertain any question under Section 66, Income Tax Act, that the preliminary requirements of the section are strictly complied with. The stringency of these requirements is clearly deliberate. It is the intention of the enactment that the High Court is not to be flooded with such applications. The object is salutary and in their Lordships' judgment the High Court will be well advised, before they entertain any question under the section, always to see that the preliminary statutory conditions have been fully observed."

For the above reasons I would answer the first question in the negative, and, in the circumstances, the Court declines to give an answer to the second question. The Commissioner is allowed his costs, ten gold mohurs.

DAS, J.—I agree.

SEN, J.—I agree.

Reference answered.

[IN THE HIGH COURT OF MADRAS.]

COMMISSIONER OF INCOME TAX, MADRAS

v.

THE MADRAS CRICKET CLUB.

Beasley, C. J., Ramesam and Sundaram Chetty, JJ.

May 1, 1934.

INCOME TAX—LESSOR AND LESSEE—ERECTION OF BUILDING BY LESSEE—LESSEE ENTITLED TO REMOVE BUILDING ON TERMINATION OF LEASE—ASSESSMENT OF LESSEE ON ANNUAL

VALUE OF BUILDING—'OWNER,' MEANING OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 9.

An assessee who takes on long lease a parcel of land from the Government and erects buildings thereon and is entitled under the terms of the said lease to remove the buildings within a stipulated period on the termination of the said lease is assessable in respect of the annual value of the buildings under Section 9 of the Indian Income Tax Act, 1922.

In order that a person may be assessed as the owner of a building under Section 9, it is not necessary that he should also be the owner of the land on which the building stands.

Reference made by the Commissioner of Income Tax, Madras under Section 66 (2) of the Indian Income Tax Act (XI of 1922). [Original Petition No. 283 of 1933].

ORDER OF REFERENCE.—"I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under Section 66 (2) of the Indian Income Tax Act, XI of 1922 (hereinafter referred to as the Act).

2. The Madras Cricket Club, the petitioner (hereinafter referred to as the Club), is an association which was registered as a limited company under Section 26 of the Indian Companies Act, 1913, on 26th March, 1925. The objects of the Club as set out in its Memorandum of Association are, *inter alia*:—

(*a*) To promote the following and any other pursuits, pastimes, games and entertainments which the Club may from time to time resolve to promote, *viz.*, Cricket, Hockey, Lawn Tennis, Squas Racquetsh and to promote and hold alone or jointly with any other Association, Club or persons, Lawn Tennis and other Meetings, Competitions, Tournaments and Matches and Gymkhanas.

(*b*) To promote social intercourse amongst members of the Club, their families and friends.

(*c*) To provide a Club House and grounds for the accommodation of members and the families and the friends or members temporarily staying with them.

(*d*) To take over the effects and liabilities of the present unincorporated club known as the Madras

Cricket Club including the lease of its Club House and grounds.

(*e*) To purchase, take on lease or in exchange or otherwise acquire any immoveable or moveable property.

(*f*) To sell, improve, manage, lease, dispose of, turn to account or otherwise deal with all or any part of the property of the Club and to invest and deal with the moneys of the Club not immediately required upon such securities and in such manner as may from time to time be determined.

3. Prior to incorporation the Club existed as an unincorporated body under the same name, *viz.*, The Madras Cricket Club. This unincorporated Club was in occupation from 1865 onwards in pursuance of a Government (Madras) Order, G. O. No. 401, dated 20th April, 1865, an extract of which is filed, marked Exhibit A. In or about 1890 it erected on these premises the main pavilion for its use and thereafter made various improvements and extensions thereto till 1925.

After the incorporation of the Club on 26th March, 1925, it took over the effects and liabilities of the unincorporated Club including all the abovementioned buildings and the site in accordance with its objects set out in Clause (d) of its Memorandum of Association extracted above and entered into a formal lease of the premises with the Government of Madras for a period of 20 years commencing from 1st May, 1925, on a yearly rent of Rs. 500 for the first 5 years, Rs. 750 for the next 5 years, and Rs. 1,000 for the last 10 years. A copy of the lease deed dated 1st May, 1925, is filed marked Exhibit B. The Club has been making further improvements to the buildings after its incorporation and has been writing off every year a portion of the capital cost on account of depreciation. According to the Club's balance sheet as on 31st August, 1931, the total value of the buildings, including the compound walls is Rs. 38,420 and according to the municipal registers the gross annual letting value of the buildings alone is Rs. 1,359.

4. The Club derives income from its members by way of subscriptions, donations and cost of refreshments supplied and

from the public (non-members) by way of gate collections when matches and tournments are held within its precincts. It derives also income from Bank investments. The Club was assessed till the year 1931-32 on its income from such gate collections, less proportionate expenditure and on the interest derived from the investments; but not on the annual letting value of the buildings.

5. For its assessment of the year 1932-33 (previous year—year ending 31st August, 1931) the Income Tax Officer, II Circle, Madras, within whose jurisdiction its registered office is situate, considered that as the Club was the owner of the said buildings it was assessable in respect of the annual value of such buildings, under Section 9 of the Act in addition to its other income. He therefore included in the assessment the net annual value of the buildings (after deducting 1/6 for repairs), *viz.*, Rs. 1,132.

6. The petitioner appealed to the Assistant Commissioner and contended

(1) that it held the premises and the buildings erected thereon by virtue of a lease dated 1st May, 1925, between itself and the Secretary of State for India, and

(2) that as it is not the owner either of the buildings or of the land within the meaning of Section 9 of the Act and is only a lessee as aforesaid it is not chargeable under that section or under any other provision of the Indian Income Tax Act upon the annual value as assessed by the Income Tax Officer or on any other value.

The Assistant Commissioner overruled these contentions and held for the reasons stated in his order that though the petitioner was not the owner of the land taken on lease it was nevertheless the absolute owner of the buildings erected by it on such land as evidenced, by its balance sheet and that therefore it was correctly assessed under Section 9 in respect of the annual value of such buildings. A copy of the Assistant Commissioner's order is filed marked Exhibit C.

7. The petitioner Club now requires me to refer to the High Court the following question of law as re-framed by me and agreed to by it :—

"Whether an assessee who takes on long lease a parcel of land from Government and erects buildings thereon with their permission and is entitled under the terms of the said lease to remove the buildings within a stipulated period on the termination of the said lease is not assessable in respect of the annual value of the buildings under Section 9 of the Act."

8. The petitioner contends that Section 9 properly construed does not apply to lessees holding property under a lease and that both according to the practice of the Government of India and the observations in 57 Calcutta page 910, Section 9 is not applicable to the owners of a limited interest in property, such as lessees. The petitioner refers here, apparently, to the *obiter dictum* of Rankin, C. J., in *Gooptu Estates Limited* v. *Commissioner of Income Tax, Bengal*, at page 149, and to the instruction in sub-paragraph 3 of paragraph 29 of Part III of the Income Tax Manual. In that case the Gooptu Estate Limited was merely the lessee of certain house properties. The owner of the properties was entirely a different person and the income derived was from sub-letting these properties. The observations in the case and the instructions in paragraph 29, sub-paragraph 3, Part III, Income Tax Manual, apply only to cases where the income is from sub-letting house properties. In the present case, the income in question is not derived by sub-letting the property but is the annual letting value of the buildings erected by the Club. The fact that the buildings were built on leasehold lands cannot be a ground for holding that they are not owned by the Club. The provision in the lease deed that the Club can remove the buildings or other structure erected on the land by it on the termination of the lease, establishes its ownership over the buildings.

I would respectfully beg leave to invite a reference to the case of *Seths Basant Rai and Takhat Singh* v. *Commissioner of Income Tax, United Provinces.* Though the decision of the Allahabad High Court in that case was that the income from such house properties was assessable under Section 12 of the Act, the correctness of the decision has been doubted by their Lordships

of the Privy Council in the appeal against the same judgment (Privy Council Appeal No. 68 of 1932). That was also a case in which the lessee owned the property and another party the land; but there is this difference in the facts of the two cases, that in that case the buildings were, under the terms of the lease, to revert to the lessors on its expiry, whereas in the present case the lessee is entitled to remove the buildings. That is a difference which undoubtedly strengthens the case for the Income Tax Department in the present matter. I am therefore of opinion that the petitioner Club being the owner of the buildings in question is assessable on its annual value less allowable deduction under Section 9 of the Act. The question should be answered accordingly."

M. Patanjali Sastri, for the petitioner.

C. Krishnaswamy Ayyar instructed by *King and Partridge*, for the respondent.

BEASLEY, C. J.—The question referred to us is:

"Whether an assessee who takes on long lease a parcel of land from Government and erects buildings thereon with their permission and is entitled under the terms of the said lease to remove the buildings within a stipulated period on the termination of the said lease is not assessable in respect of the annual value of the buildings under Section 9 of the Act."

The facts may be stated quite shortly. The Madras Cricket Club—or rather its predecessor, because the present Madras Cricket Club has now become incorporated—came into occupation of its present ground by a Government Order in 1865 and the title to remain there rested on that order until 1925 when they got themselves incorporated and at the same time took the land upon a long lease from Government. In the lease there is a provision for permitting the removal of the buildings erected upon the land by the assessees at the expiration or upon the determination of the lease. The assessees are assessed under two heads, *viz.*, profits and gains and 'property' under Section 9. In the former assessment they are assessed on the receipts from gate money collected from those who enter the ground in order to witness the cricket and tennis matches which take place there. No question arises with regard to that assessment. They are,

secondly, as before stated, assessed as owners of property, that is to say, they are assessed on the annual value of the buildings which have been put upon the land by the assessees such as the Cricket pavilion and the offices attached thereto. These buildings were erected whilst the assessees were in occupation under the Government Order of 1865. The first contention put forward here by the assessees is that they are not the owners of the buildings which are now upon the land. The rule in India which is different from that in England, is that a person who builds a superstructure upon the land of another man remains the owner of the superstructure and can at the end of his term remove that superstructure from the land, whereas in England a person who erects a building on the land of another cannot do so as the building at the end of the lease becomes the property of the lessor. It is contended that as the title to the Cricket Club to remain in occupation of that land ceased in 1925 when a long lease was taken from Government and as it did not on the cessation of that tenure remove the buildings from the land, it must be deemed that the Government became the owners of those buildings and that the assessees consented to that position. I see nothing to warrant any such supposition. All that happened was that the tenure became a different one. Instead of being one by the licence of Government it became one under a letting and one of landlord and tenant, the Government being the landlord and the assessees being the tenants. I am quite satisfied that the assessees remain the owners of these buildings. I now come to the next question raised and that is that the income-tax authorities are not entitled to assess the assessees as the owners of these buildings because it is argued that the section contemplates only an assessment upon full owners of buildings. I am not at all clear as to what is meant by the description "full owners." So far as I understand it, what is contended for in connection with the description is that in order to come within the provision of this section the person who owns the building must also be the owner of the land upon which it stands and possibly the land surrounding it. I see nothing to warrant any such contention. Section 9 (1) says that the tax shall be payable by an assessee under the head "property" in respect of the *bona fide* annual value of property

consisting of any buildings or lands appurtenant thereto of which he is the owner. Clearly the Madras Cricket Club, the assessees here, are the owners of those buildings and therefore they fall to be assessed under Section 9. The answer to the question referred to us must therefore be that the assessees are assessable in respect of the annual value of the buildings under Section 9 of the Act. Costs to the Commissioner of Income Tax, Rs. 250.

RAMESAM, J.—I agree.

SUNDARAM CHETTY, J.—I agree.

Reference answered accordingly.

[IN THE JUDICIAL COMMISSIONER'S COURT OF SIND.]

KHEMCHAND RAMDAS

v.

COMMISSIONER OF INCOME TAX, BOMBAY.

Aston, A. J. C., and Rupchand, A. J. C.

January 22, 1934.

INCOME TAX—REFERENCE—BEST JUDGMENT ASSESSMENT—APPEAL ENTERTAINED AND DISMISSED BY ASSISTANT COMMISSIONER—REFERENCE, COMPETENCY OF—POWER TO RE-SETTLE ISSUES—SUPER-TAX—DEMAND AFTER UNREASONABLE DELAY—VALIDITY—FIRM—CANCELLATION OF REGISTRATION AFTER ONE YEAR—LEGALITY—COMMISSIONER'S POWERS OF REVISION—TIME LIMIT—APPEAL AGAINST BEST JUDGMENT ASSESSMENT—WHEN LIES—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 23 (4), 30, 31, 58 and 66 (2), (3), (5).

Whether the Assistant Commissioner had jurisdiction or not to hear an appeal, if he did in fact hear the appeal and pass an order under Section 31 of the Income Tax Act dismissing the appeal, the requirements of Section 66 (2) of the Act are satisfied and the High Court would have jurisdiction to require the Commissioner to state a case under Section 66 (3).

It is not open to the Bench which hears a reference to consider whether the order which the High Court had made under Section 66 (3) directing the Commissioner to state the case was valid.

In hearing a case stated by the Commissioner the High Court is to decide the questions of law that arise in the case; it is not bound by the points of law raised by the applicant or the Commissioner. The questions of law must, however, arise out of the appellate order.

In order to be valid, a demand for super-tax should be made within a reasonable time of the assessment for income tax, almost simultaneously, if not in the same notice. A demand for super-tax made more than two years after assessment to income-tax is unreasonable and illegal.

The Commissioner's powers under Section 33 of the Act are subject to the time limit of one year mentioned in Sections 34 and 35. Where an order for registration as a firm was made and the Commissioner, after the expiry of more than one year, purporting to act under Section 33, cancelled the registration and levied super-tax: Held, *that the order of cancellation and demand of super-tax were illegal.*

RUPCHAND, A.J.C.—*The proviso to Clause (1) of Section 30 does not take away the right of appeal in cases where an assessee upon whom an assessment has been made under Section 23 (4) does not challenge the assessment itself, but only challenges his liability to be assessed in the capacity in which he has been assessed, for instance, where the contention is that the assessees ought not to have been assessed as an unregistered firm but only as a registered firm. Although the Income Tax Act does not prescribe any period of time within which a notice under Section 29 should be served, it must be served within a reasonable time.*

Cases referred to:

ATTORNEY GENERAL *v.* AVELINE ARAMAYO & Co. [1925] (K.B. 86; 93 L.J.K.B. 145; 132 L.T. 415; 40 T.L.R. 785).

BHAGWATI PRASAD, *In re* [1932] (I.L.R. 54 All. 496; 138 I.C. 682; A.I.R. 1932 All. 390; 1932 A.L.J. 389).

CHAMARI SINGH *v.* PUBLIC PROSECUTOR, ETAWA [1925] (I.L.R. 4 Pat. 24; 83 I.C. 730; A.I.R. 1925 Pat. 330).

COMMISSIONER OF INCOME TAX, BOMBAY *v.* NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA [1931] (I.L.R. 55 Bom. 637; 134 I.C. 555; A.I.R. 1931 Bom. 448; 1932 COMP. CAS. 1).

COMMISSIONER OF INCOME TAX, BOMBAY *v.* SIND LIGHT RAILWAY CO., LTD., [1932] (27 S.L.R. 47 ; 138 I.C. 673 ; A.I.R. 1932 Sind 189).

COMMISSIONER OF INCOME TAX, MADRAS *v.* ABDUL KADIR MARAKAYAR & CO. [1928] (108 I.C. 73; A.I.R. 1928 Mad. 257).

FIRM OF BULCHAND KESHAVDAS *v.* COMMISSIONER OF INCOME TAX, [1930] (25 S.L.R. 182 ; 128 I.C. 678 ; A.I.R. 1930 Sind 301).

GANESH DAS *v.* COMMISSIONER OF INCOME TAX, [1927] (I.L.R. 8 Lah. 354 ; 100 I.C. 675 ; A.I.R. 1927 Lah. 248).

GANGASAGAR, *In re* [1931] (I.L.R. 53 All. 451 ; 132 I.C. 329 ; A.I.R. 1931 All. 417).

HILDESHEIMER *v.* W. F. FAULKNER [1901] (2 Ch. 552 ; 70 L.J. Ch. 800 ; 85 L.T. 332).

JESA RAM *v.* COMMISSIONER OF INCOME TAX [1927] (I.L.R. 8 Lah. 347 ; 101 I.C. 139 ; A.I.R. 1927 Lah. 421).

LONDON COUNTY COUNCIL *v.* AYLESBURY DAIRY CO. [1898] (1 Q.B. 106 ; 67 L.J.Q.B. 24 ; 77 L.T. 440).

RAJENDRA NARAIN *v.* COMMISSIONER OF INCOME TAX [1929] (I.L.R. 5 Pat. 13 ; 91 I.C. 288 ; A.I.R. 1925 Pat. 581).

RAMAKRISHNA RAMNATH *v.* COMMISSIONER OF INCOME TAX, C.P. [1932] (139 I.C. 290 ; A.I.R. 1932 Nag. 65).

TRIKUMJI JIVANDAS *v.* COMMISSIONER OF INCOME TAX [1925] (I.L.R. 4 Pat. 224 ; 86 I.C. 170 ; A.I.R. 1925 Pat. 352).

TUCK & SONS *v.* PRIESTER [1887] (19 Q.B.D. 629 ; 56 L.J.Q.B. 553).

Case stated by the Commissioner of Income Tax, Bombay, under Section 66 (3) of the Income Tax Act, (1922) : Civil Miscellaneous Application No. 37 of 1931.

Himatrai Bhojraj, for the applicants.

C. M. Lobo, for the opponents.

ASTON, A. J. C.—The Commissioner of Income Tax, Bombay Presidency, has now stated a case for decision as directed by this Court on 15th December, 1932. The facts briefly are as follows : The firm of Khemchand Ramdas carry on business at Bundar Abbas and Kernan outside British India. On 18th May, 1926, they applied under Rule 2, Income Tax Rules, for the

registration of their firm for the purpose of their assessment for 1926-27. The Income Tax Officer, Shikarpur, requested them to put in a return of income, as required by Section 22 (2), Income Tax Act, XI of 1922. He also asked them to put in accounts, but they did not put in a return nor did they produce accounts. On 17th January, 1927, the Income Tax Officer assessed them for 1926-27, on an income of Rs. 1,25,000 under Section 23 (4) of the Act. On the same date, *viz.*, 17th January, 1927, the Income Tax Officer ordered the registration of the firm under Rule 4, Income Tax Rules. On 4th February, 1928, the Income Tax Officer, Shikarpur, took proceedings against the firm under Section 34, Income Tax Act, with reference to alleged income which he believed had escaped assessment in 1926-27. These proceedings were eventually withdrawn on 7th May, 1929.

On 9th January, 1928, a notice was served on the firm under Section 33 of the Act to show cause why the Income Tax Officer's order dated 17th January, 1927, for the registration of the firm should not be set aside. On 13th February, 1928, the Commissioner, after considering the representation made by the firm in response to the notice, in the exercise of his powers under Section 33 cancelled the order of the Income Tax Officer for the registration of the firm. In view of the cancellation of registration the same Income Tax Officer on 7th May, 1929, demanded a sum of Rs. 5,468-12-0 as super-tax under Section 29 of the Act.

On 4th June, 1929, the firm appealed to the Assistant Commissioner of Income Tax against this order. The Assistant Commissioner considering the appeal to be one under Section 30 heard the appeal. On 12th April, 1930, he dismissed the appeal under Section 31. On 6th May, 1930, the firm applied in revision to the Commissioner under Section 33 of the Act. The firm also made a separate application for a reference to this Court in case the Commissioner was unable to grant relief. On 4th June, 1930, the Commissioner served a notice on the firm to show cause why the appellate proceedings and the Assistant Commissioner's order should not be quashed. On 29th August, 1930, the Commissioner quashed the appellate proceedings and the appellate order. The Commissioner rejected the application to cancel the demand for super-tax and he also rejected the applica-

tion for a reference to the High Court on 22nd September, 1930.

On 15th December, 1932, this Court in the exercise of powers under Section 66 (3) of the Act directed the Commissioner to state a case. In stating the case the Commissioner has devoted considerable space in developing a legal argument challenging the validity of the order directing him to state a case.

It may be briefly pointed out in this connection that whether the Assistant Commissioner had jurisdiction or not, he did in fact hear the appeal of the assessee and he passed an appellate order under Section 31 dismissing the appeal; so the requirements of Section 66 (2) were satisfied. In this connection see *Wazir* v. *Palit*.

It is not, however, open to this Bench to consider whether the order under Section 66 (3) directing the Commissioner to state a case was valid. See *Chamari Singh* v. *Public Prosecutor, Etawa*, *Ramakrishna Ramnath* v. *Commissioner of Income Tax, C. P.* and *Trikumji Jiwan Das* v. *Commissioner of Income Tax, Bihar and Orissa.*

Sub-section 5 of Section 66 enacts that the High Court upon the hearing of any such case shall decide the questions of law raised thereby; the Court is not bound by the applicant's points of law or the Commissioner's. See *Gangasagar*, In re, *Bhagwati Prasad*, In re, and *Commissioner of Income Tax, Bombay* v. *National Mutual Life Association.* But the questions of law must arise out of the appellate order.

It is contended on behalf of the firm of Ramdas Khemchand that the intention of the legislature was that the demand of income-tax and super-tax should be simultaneous; that the demand of super-tax on 4th May, 1929, about two years and four months after the assessment of the firm on 17th January, 1927, under Section 23 (4) was illegal and that the cancellation of registration on 13th February, 1928, more than a year after the order of registration was illegal.

I am of opinion that their contentions are well founded. The form of notice of demand under Section 29, Income Tax Act, 1922, provided by the Income Tax Rules shows a simultaneous demand both for income-tax and super-tax. I agree with the view expressed in *Rajendra Narayan* v. *Commissioner of Income*

Tax, Bihar and Orissa, that in order to be valid a demand for super-tax should be made within a reasonable time of the assessment for income tax. Two years and four months or thereabouts was, in my opinion, a wholly unreasonable time. The demand, therefore, of Rs. 5,468-12-0 on 4th May, 1929, was, in my opinion, illegal. I am also of opinion that the order of the Commissioner, cancelling the order of the Income Tax Officer directing the registration of the firm more than a year after the order was made was invalid. The words "subject to the provisions of this Act" as Mr. Rajagopala Chari points out in the Law of Income Tax in India at p 198 indicate that the Commissioner's powers under Section 33 of the Act are subject to the time limit of one year mentioned in Sections 34 and 35 : see *Jesa Ram* v. *Commissioner of Income Tax*, *Ganesh Das* v. *Commissioner of Income Tax* and *Commissioner of Income Tax* v. *Abdur Kadir Marakayar and Co.* As the Order dated 17th January, 1927, of the Income Tax Officer, was revised and cancelled by the Commissioner on 13th February, 1928, more than a year after it was passed, the cancellation was, in my opinion, illegal. Costs, in my opinion, should be borne by the Commissioner of Income Tax.

RUPCHAND, A. J. C.—Briefly stated, the case of the applicants is somewhat as follows:

It is true that the applicant did not make their return of income within the extended time allowed to them, but they had applied for registration of their firm and were assessed as a registered firm. They were therefore exempted from super-tax under Section 55 of the Act which amounts to about Rs. 5,468 and no demand was made upon them for the same. They were content with the order passed by the Income Tax Officer and did not therefore avail themselves of the provisions of Section 27. They also took no steps to safeguard themselves by making the individual partners of their firm liable for their share of the super-tax or for the individual partners of the firm to protect themselves against the claim, if any, made against any of them for super-tax under the proviso to Section 55 of the Act. They say that the order assessing them as a registered firm was passed on 17th January, 1927, and that they could not be made to pay more than what was demanded from them in pursuance of that order except under Sections 34 and 35 and on a notice served on

them within one year of the date of the assessment, that is to say, before 17th January, 1928. Their contention is that super-tax is nothing but additional income-tax which is being levied from them.

Proceedings under Section 34 were not taken against the applicants within the year allowed by law, but later. These proceedings were taken on 4th February 1928, and were dropped. The applicants were thus deprived of challenging the validity of these proceedings on the point of limitation and also making a return if they so wished. These proceedings were moreover taken against the applicants as a registered firm and not as an unregistered firm, and therefore also they could not be taxed as an unregistered firm after the period of limitation.

The amended provisions of Section 23, Clause (4), which empower an Income Tax Officer to cancel registration of a firm on failure to make a return were not in force at the time of the assessment in question, and the applicants say that there is not only no question of the Income Tax Officer being able to act under the provisions of the amended section, but he has not attempted to do so. For all intents and purposes therefore assessment levied on the applicants as a registered firm became final after the expiry of one year from the date of the order passed by the Income Tax Officer.

The Commissioner of Income Tax issued a notice dated 9th January, 1928, to the applicants to show cause why the registration of their firm should not be withdrawn, and on 13th February purporting to act under Section 33 he cancelled the registration of the firm. On the strength of this order, the Income Tax Officer issued a notice under Section 29 of the Act requiring the applicants to pay super-tax. The applicants challenge the validity of the order passed by the Commissioner cancelling the registration of their firm, and contend that the order even if valid, did not empower the Income Tax Officer to issue a fresh notice under Section 29 after the expiry of the period of limitation.

Their appeal to the Assistant Commissioner of Income Tax against the issue of this fresh notice of demand and the levy of super-tax having been dismissed, and the request to the Commissioner to state a case to the Court having been likewise

disallowed, they have come to us for relief under the provisions of Section 66, Clause (3).

At the preliminary hearing, two grounds were urged on behalf of the Commissioner; first, that as the order of the Assistant Commissioner had been vacated by him as *ultra vires*, no question of law arising out of such order could be referred to us: and, secondly, that as the Commissioner had not refused to state a case on the ground that no question of law arose out of the order of the Assistant Commissioner but on the ground that as there was no order of the Assistant Commissioner in existence, Clause (3), Section 66, had no application.

Both these grounds were dealt with by us on 15th December, 1932, and after a full hearing we directed the Commissioner to state the case to us.

An attempt has been made to re-agitate the same questions now. But I am afraid that the Commissioner cannot go behind our order at this stage, whatever may be his rights to challenge that order before their lordships of the Privy Council.

The learned Commissioner has under protest propounded the following questions for our decision: (1) Whether in spite of the fact that the assessment in this case was levied under Section 23 (4) of the Act and in spite of the provisions of the provisio to Section 34 of the Act, the assessee had any right to present an appeal under Section 30 of the Act? (2) Whether in the above circumstances, it was competent on the part of the Assistant Commissioner to hear such an appeal, and whether the appellate decision given could be said to be a legal appellate decision under Section 31 of the Act? (3) In case the answer to questions (1) and (2) be in the affirmative, whether there is any provision in the Income Tax Act laying down (*a*) any time limit within which an Income Tax Officer should issue a notice of demand under Section 29 of the Act after he has passed an order under Section 23 of the Act, and (*b*) that the notice of demand under Section 29 of the Act on account of super-tax be issued simultaneously with the notice of demand for income tax under the same section.

It has been argued that the points raised by the Commissioner are not the real points in dispute, and, at any rate, they are not all points of law which arise for our determination.

I agree with my learned brother that it is open to us to re-settle, if necessary, the points of law which arise out of a case submitted to us under Section 66 (3), subject however to the limitation laid down by this Court in the *Commissioner of Income Tax, Bombay* v. *Sind Light Ry. Co. Ltd.*, and to give our decision thereon. In *Attorney-General* v. *Avelino Aramayo and Co.* at p. 108, Atkins, L. J., has said:

" As I read the statutory procedure, which at that time depended on Section 59, Taxes Management Act, 1880, the Court is not limited to particular questions raised by the Commissioner in the form of questions on the case. All that the section provides is that if the appellant is dissatisfied with the determination as being erroneous in point of law, he may require the Commissioners to state and sign a case, and the case shall set forth the facts and the determination, and upon that being done, the Court has to decide whether or not the determination was or was not erroneous in point of law, and any point of law that can be raised properly upon the facts found by the Commissioners the Court can decide. No doubt there may be a point of law in respect of which the facts have not been sufficiently found, and if that point of law was not raised below at all and cannot be raised without further facts on either side, the Court may well refuse to give effect to it, and either party may have precluded themselves by their conduct from raising in the Court of Appeal the point of law which they deliberately refrained from raising down below. These questions, of course have to be considered. But, apart from that, if the point of law or the erroneous nature of the determination of the point of law is apparent upon the case as stated, and there are no further facts to be found, the Court can give effect to the law."

I think these observations may be accepted as a reasonable guide in dealing with cases stated to us under Section 66, Clause (3), of the Indian Act. I think the points raised by the Commissioner do arise out of the case, although one more point raised by my learned brother as point No. 2 and which would be presently referred to might well have been raised. This point is perhaps the main point in dispute. I shall first deal with the points raised by the Commissioner.

FIRST POINT—It is contended on behalf of the applicants that they were recognised as a registered firm and were assessed as such. The failure on their part to make a return no doubt deprived them of their right to appeal to the Assistant Commissioner against the assessment levied upon them as such registered firm. But nothing more. Although the order recognising the applicants as a registered firm was passed simultaneously with the order determining their income, it must be presumed to be prior in time. The Act contemplates different kinds of taxable persons. Before, therefore, the income of any such person is assessed, it is necessary for the Income Tax Officer to classify the person to be taxed and to tax him accordingly. The taxes payable by different classes of persons differ in several respects. If the assessee is a company, the income-tax is calculated at a fixed rate. If, on the other hand, the assessee is not a company, such person is to be taxed according to a certain rising scale, and unless the assessee is a registered firm such person is further required to pay an additional tax called super-tax.

As a matter of fact, the order recognising the applicants as a registered firm might have been passed a few days earlier or even a year earlier, and then might even have been taxed as a registered firm for the previous year. Can it be then said that merely because the applicants failed to fill up their form, they lost their right of challenging their liability to pay the super-tax and thus pay a double penalty of not only being made to pay the ordinary income tax upon a supposed basis of income, but also be made to pay additional tax as an unregistered firm?

Can it also be said that prior to the amendment of Section 23 authorising the Income Tax Officer to cancel registration, his action in levying super-tax from a registered firm could have been maintained and that the mere failure on the part of the assessees to make the return would have been considered sufficient to deprive them of their right to appeal? Or, as matter of that, even under Section 23 as amended if the Income Tax Officer had cancelled the registration of the firm without complying with the terms of the proviso to Clause (4) of the section, can it be said that the assessee's right of appeal is excluded in consequence of his initial failure to make a return?

Section 58 makes the provisions of Section 30 applicable to the levy of super-tax. The words of the latter section *inter alia* give a right of appeal to an assessee "denying his liability to be assessed under the Act." These words are wide enough to include within their ambit the denial of liability to be assessed to super-tax.

Where the assessee is a registered firm, *prima facie*, it is within the competence of such firm to deny its liability to be assessed to super-tax under Section 56 of the Act, and to appeal against a demand made for payment of such tax.

Does the proviso to Clause (1) of Section 30 then take away his right of appeal? I think not. In such a case, the assessee is appealing against his liability of being assessed as an unregistered firm. He is not appealing in respect of the assessment made under Section 23, Clause (4), or under that clause read with Section 27, so as to attract the applicability of the proviso.

This is a penal proviso. It purports to take away the right of appeal conferred by Clause (1), and should therefore receive a strict construction.

The ordinary legal meaning of the expression "no appeal shall lie in respect of an assessment under sub-section (4) of Section 23" does not mean that no appeal shall lie in respect of any and every matter, although it is not dependent upon the assessment having been made under sub-clause (4) of Section 23.

It is a well settled rule of construction that the Court will not hold that a penalty has been incurred unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it: *Tuck and Sons* v. *Priester*, at page 645: *London County Council* v. *Aylesbury Dairy Co.*, at page 199. In the last cited case, Wright, J., has said:

"I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."

Another equally well settled rule of construction is that where a proviso to a section is open to a double construction,

one which inflicts a penalty and the other which does not, the latter construction should prevail: *Hildesheimer* v. *W. F. Faulkner*.

In my opinion, there is no scope for argument that the proviso in question has the effect of taking away a right of appeal in cases where the assessee does not challenge the assessment levied on him under Section 23, Clause (4), but only challenges his liability to be taxed in a different capacity than that possessed by him and more so when such a capacity has been duly recognised by the Income Tax Officer. Even if the proviso be open to a double construction, I would hold that the proviso should be so interpreted as to exclude an appeal only in respect of an assessment levied under Section 23, Clause (4), and not to an appeal of this nature.

Although there may be good grounds for depriving a party, who has not made a return, of appealing against the assessment levied on him on such materials as are available, he being the party at fault, I can see no reason why the right of appeal conferred upon him by Clause (1) should be denied to him when he does not challenge the assessment so levied, or that he should be penalised further by being made to pay additional duty as a different taxable person. I am strengthened in the view I have taken of the effect of the proviso by the very fact that the legislature has thought it fit to amend Section 23 of the Act so as to empower an Income Tax Officer to cancel the registration of a firm which fails to make a return.

It is only under the amended section that the Income Tax Officer may doubly penalise the defaulting party both by summarily assessing his income and by cancelling registration. Even under the amended section where the Income Tax Officer wants to impose a double penalty, he is required to follow a certain procedure of giving notice so that the recalcitrant party may make the return and thus avoid a double penalty.

My answer, therefore, on the first point raised by the Commissioner is that the appeal by the applicants to the Assistant Commissioner was competent under Section 58 read with Section 30 (1) of the Act.

Second Point.—It follows from the opinion given by me on the first point, that the decision given by the Assistant Commissioner was a legal decision under Section 35 of the Act.

Third Point.—The first question raised by the Commissioner under this heading has already been answered by the Patna High Court in *Rajendra Narain* v. *Commissioner of Income Tax.* Although the section does not prescribe any period of time within which the notice under Section 29 must be served, yet there can be no doubt that such notice must be served within a reasonable time.

With regard to the second question raised under this heading, it would appear that the form prescribed under the Act indicates that the demand for super-tax should be made at the same time when the demand for the ordinary income tax is made. Our attention has, however, not been drawn to any rule of law prohibiting a demand for super-tax being made by a separate notice. But whether the demand for super-tax be made in the same notice or not, I am of opinion that such demand should also be made within a reasonable time, and therefore almost simultaneously with a demand for the ordinary income tax.

On the contentions raised by the applicants, my learned brother has re-settled the issues and has raised the following issues for decision:

Issue 1.—Whether the demand for income tax and super-tax should be simultaneous? This issue is covered by the second question raised under the third point by the Commissioner. As said above, I am of opinion that both demands should be made about the same time although they need not be contained in the same notice.

Issue 2.—Whether the demand for super-tax should have been made within reasonable time and whether a demand after a delay of two years and four months was unreasonable, rendering the demand illegal?

I think this issue brings out more clearly the real point in dispute than the first question under the third heading propounded by the Commissioner. I agree with my learned brother in this opinion that the demand for super-tax should have been

made within a reasonable time, and that the demand having been made after a lapse of nearly two years and four months was illegal.

With regard to the last point raised by my learned brother which equally arises from the case stated to us and forms the substratum of the second demand notice which is in issue, I am of opinion that the order passed on review by the Commissioner does not in law empower the Income Tax Officer to make a fresh demand for super-tax on the strength of such order.

It may be that it is open to the Commissioner to review a wrong order at any time, and he can certainly do this for the future guidance of his subordinates. But if by such an order he wishes to prejudice the assessee in respect of the assessment already levied, he can only do so "subject to the provisions of the Act."

It is clear from the scheme of the Act that it is the Income Tax Officer who is required to issue a demand notice, and if the period within which that officer is empowered to issue such a notice has expired, the Commissioner cannot come to his help by a resort to the provisions of Section 33 and empower the Income Tax Officer to issue a demand notice after the expiry of such time, and thus get over the period of limitation prescribed by the Act for issue of a demand notice. To the above extent I agree with my learned brother. But I am not prepared to go further and to hold that the Commissioner may not review an order for other purposes, for instance, an order of this nature cancelling registration for future assessment where the firm has been wrongly recognised as a registered firm.

It has been suggested that the cancellation of registration in the present case was not justified on the merits and that it is in contravention of the opinion expressed by this Court in *Firm of Bulchand Keshavdas* v. *Commissioner of Income Tax.* The order of cancellation is not before us, and I do not think it necessary to call for that order or to express my opinion upon it, as points 1 and 2 propounded by my learned brother are sufficient to dispose of the case.

I think this is a fit case in which the Commissioner should be made to pay the costs of the applicants, and I would order accordingly.

Order accordingly.

[In the Rangoon High Court.]

COMMISSIONER OF INCOME TAX, BURMA

v.

THAVER BROTHERS.

Page, C. J., Das and Sen, JJ.

December 20, 1933.

Income Tax—Profits and Receipts Distinguished—Contractor Lending Name to Sub-Contractor—Whole Receipts Paid to Sub-Contractor—Whether Contractor Liable to be Assessed on Profits—Assessment for Previous Years—How Far Binding on Successor—Contract by some Members of Family and Contract on Behalf of Family Distinguished.

Contracts for the supply of labour to certain mills stood in the name of the assessees. Security deposits were also found by them and moneys received from the mills were also entered in the assessees' accounts. The accounts however, showed that the assessees credited to their sub-contractors who were actually doing the work (and for whom the assessees had apparently lent their names) the whole sums received from the mills and that prima facie *the assessees did not enjoy any profit in respect of these contracts*: Held, *that income tax is payable not upon* receipts *but upon* profits *and as the accounts which were not discredited showed that the assessees had not made any profits out of the contracts, there were no materials upon which the Income Tax Officer could find that the receipts in connection with these contracts were profits of the assessees.* Held *also that the Income Tax Officer was not right in assuming that since in the assessment for a previous year it had been found that the profits from these contracts were profits of the assessees, he was also bound to come to the same conclusion unless the assessees satisfied him that the previous assessment was wrong. He ought to have approached*

the subject with an open mind and decided the case on the materials before him.

The assessees' accounts further showed that separate accounts were kept with regard to a contract with the Port Commissioners. This contract was entered into by two of the members of the assessees' firm as principals. Though the security was found by the joint family whose members were partners in the assessee firm, the accounts were consistent and consistent only with the contract having been entered into by the two partners alone: Held, *that so long as the accounts were not discredited, it was not open to the income tax authorities to find that the contract was made by the two partners for and on behalf of the assessee firm.*

Case stated by the Commissioner of Income Tax, Burma, under Section 66 (2) of the Income Tax Act, XI of 1922. [Civil Reference No. 22 of 1933.]

A. Eggar, for the Commissioner of Income Tax.

Clark and *Surridge*, for the assessees.

PAGE, C. J.—In this case the following questions have been propounded for our determination :—

(1) Whether there were any materials upon which the Income Tax Officer could find that the profits arising from the contracts for the supply of labour to Messrs. Bullock Brothers Mills at Kemmendine and Kanoungto were the profits of the assessees.

(2) Whether there are any materials upon which the Income Tax Officer could find that the contract with the Port Commissioners was a contract made on behalf of the undivided family of the assessees and not on behalf of a separate partnership composed of A. A. Nagalinga Thaver and A. A. Muthuswamy Thaver.

The assessees' accounts in connection with the Kemmendine and Kanoungto mills showed that the contracts in respect of the supply of labour to Messrs. Bullock Brothers at these mills were in the name of the assessees, and that the security deposits required from the assessee firm were also provided by them. The accounts also showed that the moneys received from Messrs. Bullock Brothers were entered to the assessee firm.

Income-tax is payable not upon receipts but upon profits and it appears that in the accounts relating to these two mills there were entries showing that the amount of the receipts which were entered as having been received by the assessee firm were allocated to the credit of sub-contractors who were not members of the assessee firm. If the assessee firm were carrying on the business and were acquiring the profits that accrued therefrom, it would be immaterial what use they made of the profit that they received; but if the true position was either that no profit at all from this business accrued to the assessees or that the assessees had to pay the sub-contractors who were actually doing the work the whole sum which, if the assessees had done the work, would have represented profit accruing to them from business, in either of such cases the receipts would not be assessable to income-tax as against the firm. It appears that in connection with the assessment for 1925-26 it was found as a fact by the Income Tax Officer who made that assessment that the profits accruing from these contracts were profits of the assessee firm which the assessee firm had been enjoying. The Income Tax Officer in the present case appears to have been of opinion that he ought to come to the same conclusion as that which the Income Tax Officer reached in 1925-26 in connection with the assessment upon the receipts from these mills unless the assessees satisfied him that the assessment of 1925-26 was incorrect. In my opinion that was not the correct way to approach the problem. If in the accounts there was no reference to the payments made in respect of the contracts to the sub-contractors it cannot be doubted that *prima facie* the profits accruing from these contracts would be assessable to Income Tax as against the firm; but in the present case the true position is disclosed by the accounts, which show that *prima facie* the assessee firm did not enjoy any profit in respect of these contracts. It appears that the sub-contractors were persons who might have been useful as *maistries* for the supply of labour in connection with the harvesting of crops upon the land belonging to the assessees and the representative of the assessees stated that these contracts were handed over to the sub-contractors because the assessees were prepared to forego any profit that might accrue from these contracts in consideration

of services to be rendered by the sub-contractors in connection with the reaping of their crops. A more likely explanation of the position appears to me to be that for some reason the sub-contractors were anxious to obtain these contracts with Messrs. Bullock Brothers, and that Messrs. Bullock Brothers would not be willing to give the contracts to the sub-contractors. The assessee firm, therefore, were approached by the sub-contractors with a view to persuading the firm to approach Messrs. Bullock Brothers, so that as between Messrs. Bullock Brothers and the other parties to the contracts Messrs. Bullock Brothers could have recourse to the credit of the assessee firm and that the assessee firm were prepared to lend their name in order that the sub-contractors could obtain the contracts. In my opinion there were no materials before the Income Tax Officer upon which he could have found that the receipts in connection with these contracts were profits of the assessee firm liable to income-tax. It appears to me that the Income Tax Officer did not view this matter from the right angle, but that having the 1925-26 assessment before him he formed the opinion that he ought to come to the same conclusion as the Income Tax Officer in 1925-26 unless he was satisfied that the decision of the Income Tax Officer for 1925-26 was wrong. In my opinion, if he had approached the subject with an open mind he would probably have come to the conclusion that in the circumstances of the present case there were no materials upon which he could find that the assessee firm were liable in respect of any profits accruing from these contracts.

As regards the second question the only pretended materials before the Income Tax Officer upon which he could have found that the contract with the Port Commissioners was a contract entered into by the assessee firm who would be liable to assessment in respect of any profits accruing therefrom was that the capital sum required for working this contract and making the necessary deposit came from the joint family funds of the members of the assessee firm. That is common ground. Was that material upon which the Income Tax Officer could have found that the Port Commissioner's contract had been entered into by the assessee firm? In my opinion it was not. It is the

common case of both parties as between the Port Commissioners and the other parties to the contract that the contract was entered into as appears from the agreement itself, between the Port Commisioners on the one hand and

"A. A. Nagalinga Thaver and A. A. Muthuswamy Thaver carrying on business in co-partnership at Rangoon under the style of "Messrs. A. A. Thaver Brothers hereinafter called the Contractors" which expression wherever it occurs in these presents shall include the said A. A. Nagalinga Thaver and the said A. A. Muthuswamy Thaver and the survivor of them and such other person as may be admitted into co-partnership in the said business with the previous consent of the Commissioners of the other part."

It follows, therefore, as between the Port Commissioners and the other parties to the contract that the assessee firm were not the contracting party. It further appears that separate accounts were kept in respect of the Port Commissioners' contract which are consistent and consistent only with that contract having been entered into by A. A. Nagalinga Thaver and A. A. Muthuswamy Thaver as principals. There was evidence which was not rebutted that the capital for the working of this contract and the security deposit required from the contractors had been borrowed by the persons who had entered into the contract from the funds of the joint family whose members were the partners in the assessee firm and the accounts relating to the Port Commissioners' contract contain entries which strongly corroborate the truth of the claim made on behalf of the assessee firm because it appears that *quoad* the Port Commissioners' contract inasmuch as the assessee firm had supplied the funds necessary for working it, they were credited with such sums, and, on the other hand, they were debited with the receipts received from the Port Commissioners in respect of this contract. It appears further from the accounts that this credit balance of Rs. 34,000 was wiped out within six months and that thereafter any sums which were received on this account and entered in favour of the assessee firm would have to be as between the members of the joint family debited to the firm as whole and credited to the partners who are carrying on the Port Commissioners' contract. It appears that on January 4,

1932, there was an adjustment made in respect of this contract which showed that interest amounting to Rs. 14,533 was to be debited to the joint family and credited the partners who had entered into the Port Commissioners' contract. Again, in the general accounts of the assessee firm throughout the material period, as between the different members of the joint family the receipts in respect of the Port Commissioners' contract were credited to the account of the two partners who had entered into that contract.

In these circumstances, in my opinion, unless the accounts were discredited, there were no materials upon which the Income Tax Officer could have held in respect of the Port Commissioners' contract which was entered into by A. A. Nagalinga Thaver and A. A. Muthuswamy Thaver, that the contract was made on behalf of and for the assessee firm. I find it a little difficult to understand the position taken up by the Income Tax Officer unless the accounts to which reference has been made were held to have been fabricated, and if in truth and in fact the Port Commissioners contract was a contract entered into by and on behalf of the assessee firm, it in inconceivable that a separate account in respect of the Port Commissioners' contract should have been kept, much less an account in the form in which it is found. The Income Tax Officer, however, did not discredit those accounts but stated that the account might be quite a genuine one; but he stated that notwithstanding that might be so, he attached no importance to the separate account relating to the Port Commissioners' contract, and came to the conclusion

"that the Port Commissioners' contract was not a separate concern but was undertaken by the two members of the family on behalf of and for the benefit of the joint family."

It appears to me that it was an impossible attitude for the Income Tax Officer to adopt, because if the accounts were accepted as genuine, there was no material upon which such a conclusion could have been based.

For these reasons, I would answer both questions propounded in the negative.

The assessees are entitled to their costs, ten gold *mohurs*, which must be taken to include any claim that the assessees

might have to the return of the Rs. 100 deposited under Section 66 (2).

DAS, J.—I agree.

SEN, J.—I agree.

Reference answered.

[KING'S BENCH DIVISION.]

*WILLIAMS (INSPECTOR OF TAXES)

v.

GRUNDY (W. W.) Deceased (TRUSTEES OF.)

Finlay, J.

December 11, 1933.

INCOME TAX—ADDITIONAL FIRST ASSESSMENT—DISCOVERY OF OMISSION OF PROFITS THEREFROM—CHANGE OF OPINION ON FACTS ALREADY DISCLOSED——ENGLISH INCOME TAX ACT, 1918 (8 & 9 GEO. 5. c. 40), SECTION 125, SUB-SECTION 1.

The trustees of a fund made an income tax return in which they disclosed fully a certain source of income, but contended that it was not taxable. The Inspector of Taxes accepted that contention, and no assessment was made in respect of that income. Some years later, the Inspector reconsidered the facts, and came to the conclusion (which was now admitted to be correct) that the income was taxable. He therefore directed an additional first assessment to be made, pursuant to Section 125 of the Income Tax Act, 1918. The trustees contended that the additional assessment could not be made, because the Inspector had not "discovered" any of the matters referred to in sub-Section 1 of that section: Held, *that the Inspector had discovered that profits had been omitted from the original assessment, and therefore that the additional assessment was rightly made.*

ANDERTON & HALSTEAD, LTD. *v.* BIRRELL [1931] (101 L.J. K.B. 219; [1932] 1 K.B. 271: 16 Tax Cas. 200) *distinguished.*

Cases referred to:

ANDERTON & HALSTEAD, LTD. *v.* BIRRELL [1931] (101 L.J.K.B. 219; [1932] I K.B. 271: 16 Tax Cas. 200.)

* [*Note*:—This decision throws much light on the question whether Section 34 of the Indian Act covers cases of deliberate omission to assess, upon which there is some conflict of Judicial opinion in India.]

HAYTHORNTHWAITE & SONS, LTD. *v.* KELLY [1927] (11 Tax Cas. 657.)

NATIONAL PARI-MUTUAL ASSOCIATION, LTD. *v.* R. [1930] (87 T.L.R. 110.)

R. *v.* KENSINGTON INCOME TAX COMMISSIONERS; ARAMAYO, *Ex parte* [1913] (83 L.J.K.B. 364; [1913] 3 K.B. 870; 6 Tax Cas. 279; reversed in C. A. [1914] 83 L.J.K.B. 1439; [1914] 3 K.B. 429, and reversal affirmed in H.L. *sub nom.*

KENSINGTON INCOME TAX COMMISSIONERS *v.* ARAMAYO [1915] 84 L.J.K.B. 2169; [1916] (1 A.C. 215.)

Special Case stated by the Special Commissioners of Income Tax.

At a meeting of the the Commissioners held on February 22, 1933, the respondents appealed against additional assessments to income tax made in respect of interest on Registered 5 per cent. War Stock under Case III of Schedule D for each of the four years ending April 5, 1929, 1930, 1931 and 1932. The Special Commissioners allowed the appeal, but at the request of the Crown stated this Special Case.

W. W. Grundy died on December 26, 1926. By his will he appointed the respondents to be his executors and trustees, and he bequeathed the residue of his estate to his trustees on trust to convert the same into money and to stand possessed of the proceeds in trust for his grandson, R. W. Appleton, if and when he should attain the age of twenty-one years, and with a gift over in default of his attaining that age.

R. W. Appleton was fourteen years of age at the date of the testator's death and attained his majority in the year 1933. He was an American subject and was at all material times resident in the U. S. A. During his minority the whole income of the trust was received and accumulated by the respondents. Part of the trust funds was at all times invested in Registered 5 per cent. War Stock, the interest on which formed the subject of the assessments under appeal.

Income tax is not payable on the interest on Registered 5 per cent. War Stock if the beneficial interest therein is vested in a person not resident in the United Kingdom.

In August, 1927, probate of the will and a copy of the will were forwarded by the trustees to the Inspector of Taxes. In April, 1929, the respondents made an income tax return for the year 1929-30. In this return they referred to the interest received by them on the Registered 5 per cent. War Stock, but added a note that it was held in trust for a domiciled American. The liability of the respondents to income tax was fully discussed between the Inspector and the respondents in connection with the making of an additional assessment for the year 1928-29, which the Inspector had told the respondents would be made in duc course. After that discussion, the trustees were informed by the Inspector that the proposed assessment would not be made. The respondents made returns for the years 1930-31 and 1931-32, and on these returns it was stated that the said income was not taxable and was being held in trust for Appleton "until he attains the age of 21."

In December, 1931, a new Inspector of Taxes had been appointed to the district in which the returns had been made, and he came to the conclusion—which was now admitted by all parties to be correct—that the income was taxable, since the interest of R. W. Appleton was contingent only and not vested. He therefore caused the additional assessments to be made which formed the subject of the present appeal.

Before the Special Commissioners, the respondents contended that the Inspector had not made any "discovery" within the meaning of Section 125, sub-section 1 of the Income Tax Act, 1918, which would justify the making of the additional assessments.[1]

It was contended on behalf of the Crown that the Inspector had, within the meaning of the sub-section, discovered: (*a*) that

(1) Income Tax Act, 1918, Section 125, sub-section 1, "If the surveyor discovers —that any properties or profits chargeable to tax have been omitted from the first assessments, or that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessment, or that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act, then and in every such case—. . . (ii) where the tax is chargeable under Schedule D, the Additional Commissioners shall make an assessment, on the person chargeable, in an additional first assessment, in such a sum as according to their judgment, ought to be charged . . ."

the interest was chargeable to tax and had been omitted from the first assessment; (*b*) that the trustees had not been assessed to tax in respect of the said interest: and (*c*) that the trustees had been allowed, or had obtained, exemption or relief not authorised by the Income Tax Acts.

The Special Commissioners held that there had been no "discovery" within the meaning of the sub-section. All the facts had been completely made known to the Inland Revenue, and the then Inspector had formed an opinion on those facts. A new Inspector re-examined the same facts and formed a different opinion; but that did not, in the view of the Special Commissioners, constitute a "discovery". They therefore discharged the assessments. The Crown appealed.

The Attorney-General (*Sir T. W. H. Inskip, K. C.*) and *R. P. Hills*, for the Crown.—It is true that the Inspector had not discovered any new fact, but he had discovered that there had been an escape from taxation, which is precisely what the section aims at. What is provided for is a discovery of under-assessment, and that may be founded on a change of view of the law, or on a re-examination of documents or other material which had been previously overlooked. It cannot be said that an agreement was made by the first Inspector which bound his successor, or the Crown. The Inspectors of Taxes are not agents of the Crown, capable of making agreements of this character. Neither can it be said that there is an estoppel. There is no estoppel in income-tax cases, and further there has been here no change of position in consequence of any representation.

E. Errington, for the respondents.—It is only a mistake of fact which can be "discovered". The expression is inappropriate when applied to a mistake of law. Nothing has been discovered which was not known before; all that has happened is that the Inspector has changed his opinion. If the subject pays a tax for which he is not legally liable under a mistake of law, he cannot recover it back—*National Pari-Mutual Association, Ltd.* v. *R.*—and the converse proposition is equally true, namely, that the Crown cannot recover a tax which it has remitted under a mistake of law. This case cannot be distinguished from *Anderton & Halstead, Ltd.* v. *Birrell*, where

Rowlatt, J., said (101 L.J.K.B., at p. 223; [1932] 1 K.B., at p. 281; 16 Tax Cas. at p. 208): "The word 'discover' does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion." There is a distinction between a mistake in the ascertainment of a fact and a mistake as to the fact itself.

The Attorney-Generl, in reply.—The fallacy underlying the respondent's argument is that the sub-section does not deal with the discovery of new facts, but with the discovery that some source of income has not been properly taxed.

FINLAY, J.—In this case, notwithstanding the skilful argument of counsel for the respondents, an argument which lost nothing from its brevity, I have arrived at a conclusion which differs from that of the Special Commissioners. When I differ from the Special Commissioners I always do so with hesitation.

The way the matter arises is this: certain additional assessments were made upon these trustees and they were made in respect of 5 per cent. War Stock. It is well-known that the interest of this particular stock is not liable to tax if in the beneficial ownership of a person resident abroad. Here, what happened was this: the stock in question was left to a young gentleman who is resident in the United States; it was left for his benefit, but on these terms: the trustees were "to stand possessed of the proceeds in trust for my said grandson, Robert Wilson Appleton, if and when he shall attain the age of twenty-one years and if my said grandson shall not attain the age of twenty-one years then in trust as to both capital and income, etc." Now, what happened in these circumstances was that the whole of the income was received and accumulated by the trustees in England. In August, 1927, the testator having died in 1926, probate and a copy of the will were forwarded to the then Inspector of Taxes at Wallasey. In April, 1929, the trustees made an income tax return. They referred to the interest received by them on their holding of Registered War Stock but added a note that the income was not taxable and formed part of the residuary estate, and that the income was held in trust for Mr. Appleton, a domiciled American, until he attained the age of twenty-one years. That was followed by a statutory declaration by one of the trustees that young Mr. Appleton

was the beneficial owner of the War Stock and was entitled to the interest thereon. Now, all that was mistaken, and is admitted to have been mistaken, but there was not the slightest deception; the whole position was discussed and fully discussed between the trustees and the Inspector of taxes. The question arose as to the making of an additional assessment for the year 1928-29, and, as the result of discussion, the Inspector of taxes intimated that the proposed assessment would not be made. The trustees continued to make returns for the subsequent years, for 1930-31 and 1931-32, and on those returns it was stated that the income was not taxable and was being held in trust for Mr. Appleton until he attained twenty-one years of age.

Subsequently, a new Inspector of taxes came into the district, and he came to the conclusion, and, as it is admitted, rightly, that the trustees were liable to assessment to income-tax in respect of the interest. He rightly came to that conclusion, because, as is now admitted, the interest of young Mr. Appleton in this fund was a contingent interest only. I have mentioned the fact, because it is a fact, that it was a new Inspector of taxes who came into the district and arrived at that conclusion. I desire to add that I do not attach importance from the point of view of the actual decision of the case to the circumstance that another Inspector of taxes came into the district and dealt with this matter. In my opinion, the position would have been the same if the former Inspector of taxes had on a re-survey of the facts in the light of the fuller knowledge changed his opinion. Now, in these circumstances, additional first assessments were raised for the years 1928-29, 1929-30, 1930-31 and 1931-32; appeal was made against those assessments and the appeal came before two very experienced Special Commissioners, Mr. Sanders and Mr. Jacob, and they gave their finding in this way: "It is not disputed that in this case the facts were completely made known at the time to the Inland Revenue by the appellant trustees and were fully examined by both sides. The then Inspector of taxes formed an opinon on those facts and acted upon his opinion. A new Inspector of taxes has since re-examined the same facts and formed a different opinion. These being the circumstances of this case we hold that there has been no

'discovery' within the meaning of Section 125 of the Income Tax Act, 1918."

The matter, to my mind, turns upon a correct interpretation of that section of the Act. It is not necessary to go through the series of sections, beginning with Section 100, which requires the delivery of the statement; then there is Section 118, which gives the surveyor power to examine the assessments and the statements; there is Section 121, which lays down that the Schedule D assessments are to be laid before the additional commissioners and gives power to the surveyor to make an objection if he likes; then there is Section 122, which requires the additional Commissioners to enter their assessments in books and requires that the general Commissioners shall allow and confirm the assessments. So far as to the first assessment.

Now we come to the additional assessment and the provision with regard to that upon which the whole case turns is in Section 125. It is best to read the words first: "(1) If the surveyor discovers that any properties or profits chargeable to tax have been omitted from the first assessments; or that a person chargeable has not delivered any statement or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments; or that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act, then and in every such case. . . . . (ii) where the tax is chargeable under Schedule D, the additional Commissioners shall make an assessment, on the person chargeable, in an additional first assessment in such a sum as, according to their judgment, ought to be charged. . . . ."

It will be observed that the surveyor is the person who is to discover and upon his discovery, not he but the additional Commissioners, are to make an assessment. This section has been the subject of judicial consideration in several cases. I may refer to the case of *R.* v. *Kensington Income Tax Commissioners* and *Aramayo, Ex parte*. It is proper to mention that this decision was subsequently reversed, but reversed upon quite other points, and nothing in the reversal affects the particular point with which

I am dealing. The matter is discussed by all three Judges in the judgment. I think it is only necessary, though I might cite several passages, to read a passage from the judgment of Bray, J. He said there (83 L. J. K. B., at page 370; [1913] 3 K. B., at page 889; 6 Tax Cas., at page 282): "The question which we have to consider is what is the meaning of the word 'discovers.' That word obviously has more than one meaning, and the question which we have to consider is what meaning it has in this section. Does it mean, as contended by the applicant, 'ascertain by legal evidence'?" A few lines further down he said: "The stage preceding an appeal is not that at which legal evidence is required, and it seems to me to be clear that the word 'discovers' cannot mean 'ascertains by legal evidence.' In my opinion it means, comes to the conclusion from the examination he makes and from any information he may choose to receive." If one applies those observations to the present case there seems to be little doubt that if "discover" means "coming to a conclusion from his examination," that is what here has occurred. There are other cases; I need not refer to them all, but in *Haythornthwaite and Sons, Ltd.* v. *Kelly* the present Master of the Rolls lays down the law and lays it down, I think, in precise accordance with the views of Bray, J., which I have just quoted. What he said was (11 Tax Cas., at page 664): "It is to be observed that that period of six years may, and I dare say in some cases does, put a very serious burden indeed upon the subject, because it means this, that although the subject may have cleared up his income tax—I use rather a neutral word—five years before, yet he is still liable to have a further assessment made upon him for a period which does not expire until six years after the expiration of the year of assessment."

So far, the matter would appear to be reasonably clear. Here is a question of whether an interest is vested or is contingent. If vested, one view prevails; if contingent, another; and quite obviously the question is one on which persons of intelligence applying their minds to the facts might arrive at an erroneous conclusion; and both parties here quite honestly did, as is admitted, arrive at an erroneous conclusion, with the result, of course, that there was an escape of tax. Now, the argument very clearly put by counsel for the respondents in answer to the

argument of the Attorney-General was this: he said: "well, discovery means the finding out of some fact that fact being one which did, in truth, exist at the time, but was not then known," and he cited a passage from the judgment of Rowlatt, J., in *Anderton and Halstead, Ltd.* v. *Birrell.* The facts in that case differ widely from the facts in this. In that case there had been original assessments upon the basis of a writing down in two successive years of a bad debt and some years later the Inspector suggested, not in the light of a new discovery about the estimate made at the time of the assessments, but in the light of facts which he had then discovered as to the treatment of their debts by the tax-paying company that he had discovered that the allowance was erroneous. It was held by the learned Judge that that would not do, and there is one sentence in his judgment which undoubtedly has given me anxiety because he said (101 L. J. K. B. at page 223; [1932] 1 K. B., at page 281; 16 Tax Cas. at page 208): "But the mere fact of such a discussion of the means of ascertainment indicates an assumption that there was something to be ascertained somehow. How greatly it would have simplified the problem if it could have been said that the Inspector makes a 'discovery' if he merely changes his opinion, without any new information at all." He goes on with a sentence which rather tends, I think, to favour the view which I take. "Moreover, it is to be remembered that income tax is an annual tax for the service of the year, and when one finds a provision for an additional assessment within a period of six years, one is lead to expect machinery, not for a mere revision, but for the bringing in of something which had been overlooked." With regard to the latter words I should say that in this case there was the bringing in of something which had been overlooked, the something which had been overlooked being this, that the interest of this young gentleman was not vested but was contingent. But, undoubtedly, the earlier words used by Rowlatt, J., do, I frankly agree, lend weight to the argument which was so well urged upon me by counsel for the respondents.

I have, however, come to the conclusion upon a survey of the authorities as a whole, and one must look at them as a whole, that it must not be supposed that Rowlatt, J., there was speaking

otherwise than with reference to the facts of the particular case which was before him. Clearly, I think, there could be no doubt as to the result of that case, but I do not find it possible to apply the words used by Rowlatt, J., to every case, in the sense of reading them as meaning that an Inspector can never make a discovery if the making of that discovery involves a change of opinion. I cannot think that that was what was meant, and it does not seem to me that that view is consistent with the authorities to which I have already referred.

There are only, I think, two other observations that I desire to make. One is this: quite naturally, my attention was called, and forcibly called, to the inconvenience which may arise in cases of this sort. I do not think I can give effect to that argument, because nothing is better settled than the principle that there is no estoppel as against the Crown. I do not think that this inconvenience—though I do not doubt that in some cases very real inconvenience might be caused by an additional assessment made five years after the event—is a matter which I am entitled to take into account. The other observation which I would make is that I have considered, as I was bound to consider, as carefully as I can, the authorities, but if, apart from the authorities, I look at the section itself, and after all this case does depend upon the construction of Section 125, it is, I am bound to say, rather difficult to hold on the facts of this case that the surveyor had not discovered, found out, that there were properties or profits chargeable to tax which had been omitted from the first assessments. He did, I think, find out that fact. The fact is, of course, that the properties or profits were chargeable to tax; they had been omitted from the first assessments and he found that out. The only answer to be made is that they had been omitted from the first assessments, so to speak, with his sanction, because he, like those making the return, supposed that they were not properties or profits chargeable to tax. He discovers, he finds out, that they are, and I have difficulty in seeing why this section does not then precisely apply.

Upon these grounds, differing, though with hesitation, from the Special Commissioners, I think this appeal succeeds.

Appeal allowed.

Solicitors—*Solicitor of Inland Revenue*, for the Crown; *Gasquet, Metcalfe & Walton*, agents for *Ratcliffe, Smith, Abercromby & Co., Liverpool*, for the respondents.

[In The Nagpur Judicial Commissioner's Court.]

COMMISSIONER OF INCOME TAX, CENTRAL AND UNITED PROVINCES

v.

LAXMINARAIN BADRIDAS AGARWAL.

Grille, J. C., and Subhedar, A. J. C.

April 12, 1934.

Income Tax—Application for Adjournment—Duty to Pass Order and Communicate it to Assessee—Best Judgment Assessment—Combined Notices—Legality—Application for Reopening Summary Assessment—Illness of Assessee, Whether Sufficient Cause—Procedure to be Followed in Making Best Judgment Assessment—Necessity of Making Enquiry and Recording Results of Enquiry—Capricious Assessment—Reference—Question of Law—Income Tax Act (XI of 1922), Sections 22 (4), 23 (2) and (4), 27, 66.

A combined notice under Section 22, Clause 4, and Section 23, Clause (2) of the Income Tax Act is not illegal.

Although the Income Tax Act does not specially provide for granting adjournments to comply with the terms of notices served on the assessee under Sections 22 (4) and 23 (2) of the Act, in practice adjournments are generally allowed for sufficient cause on the principle of justice, equity and good conscience, and this practice has also received judicial recognition. Consequently, if, for any reason, a prayer for adjournment is refused, a definite order, either oral or written must be passed by the officer to whom the application for adjournment is made and communicated to the assessee or his agent, when he is present, before proceeding to make an assessment under Section 23 (4) of the Act. Failure on the part of the Income Tax Officer to observe this elementary principle of judicial procedure would affect the legality of a summary assessment order.

What constitutes a sufficient cause for setting aside an assessment made under Section 23 (4), depends on the circumstances of each case; but since its determination essentially depends upon the exercise of judicial discretion, the question whether the discretion has or has not been exercised in a sound and reasonable manner invariably involves a question of law. The words 'satisfies' and 'was prevented by sufficient cause' in Section 27, are practically identical in meaning with the similar words occurring in Order IX, rule 9 and Order XLI, Rule 19 of the Civil Procedure Code.

Where an assessee upon whom a combined notice under Sections 22 (4) and 23 (2) had been served applied for an adjournment on account of his illness but the Income Tax Officer without adjourning the case and without informing him of his refusal to adjourn, assessed him summarily and an application under Section 27 to cancel the assessment was refused on the ground that there was no sufficient cause as the assessee could have sent his books through his munim : Held, *that the assessee had clearly made out a sufficient cause for having the* ex-parte *assessment re-opened.* Held, further, *that in every case, before an* ex-parte *assessment is made under Section 23 (4), Income Tax Act, the Income Tax Officer must invariably conduct such 'local inquiry' to ascertain the income of the proposed assessee for the previous year as the circumstances of the case may warrant; and the said authority must place on the record a note of the details and results of his inquiry in order that the Commissioner of Income Tax under Section 33 or the High Court under Section 66 (2) or (3) may be in a position to see that the assessment was according to the rules of reason and justice and not arbitrary. Such an assessment alone would satisfy the requirements of an assessment by the Income Tax Officer 'to the best of his judgment' within the meaning of Section 23 (4) of the Income Tax Act. Where an assessment purporting to be one under Section 23 (4) does not satisfy these conditions a point of law would invariably be involved so as to make it the subject of a reference to and decision by the High Court under Section 66 (2) or (3) of the Income Tax Act.*

An assessee failed to comply with a notice under Sections 22 (4) and 23 (2). The Income Tax Officer purporting to act on the basis of an undated 'report' assessed the income at Rs. 1,00,000 and levied assessment thereon. In the preceding two years the income of the

assessee did not exceed Rs. 47,000, and the so-called ' report' did not contain any materials for finding that the income was one lac of rupees. Held, *that under the circumstances the assessment was a capricious one and not an assessment to the best judgment contemplated by Section 23 (4).*

Cases referred to :

Abdul Bari *v.* Commissioner of Income Tax, Burma [1931] (I. L. R. 9 Rang. 281; A. I. R. 1931 Rang. 194; 133 I. C. 81).

Chandra Sen *v.* Commissioner of Income Tax, U. P. [1928] (I. L. R. 50 All. 289; A. I. R. 1928 All. 283; 108 I. C. 234).

Commissioner of Income Tax *v.* A. R. A. N. Chettiar Firm [1928] (I. L. R. 6 Rang. 21; A. I. R. 1928 Rang. 108; 110 I. C. 29).

Commissioner of Income Tax, Burma *v.* A. K. R. P. L. A. Chettiar Firm [1931] (I. L. R. 9 Rang. 25; A. I. R. 1931 Rang. 98; 132 I. C. 718).

Commissioner of Income Tax *v.* E. M. Chettiar Firm [1930] (I. L. R. 7 Rang. 635; A. I. R. 1930 Rang. 4; 122 I. C. 898).

Commissioner of Income Tax *v.* Perianna Pillai [1930] (122 I. C. 449; 58 M. L. J. 10; A. I. R. 1930 Mad. 113).

Commissioner of Income Tax *v.* P. K. N. P. R. Chettiar Firm [1930] (I. L. R. 8 Rang. 209; A. I. R. 1930 Rang. 78; 125 I. C. 344).

Commissioner of Income Tax, Burma *v.* R. M. P. Chettiar Firm [1928] (I. L. R. 7 Rang. 26; A. I. R. 1928 Rang. 38; 117 I. C. 564).

Fatima Begam *v.* Hansi [1887] (9 All. 244; 1887 A. W. N. 29).

Harmukhrai Dulichand *v.* Commissioner of Income Tax, Bengal [1928] (A. I. R. 1928 Cal. 587; 114 I. C. 90).

Kichilappa Naicker *v.* Ramanujam Pillai [1902] (I. L. R. 25 Mad. 166).

KRISHNA KUMAR v. COMMISSIONER OF INCOME TAX, BENGAL [1931] (I.L.R. 58 Cal. 906; A.I.R. 1931 Cal. 543; 133 I.C. 184; 5 I.T.C. 295.)

MUHAMMAD HAYAT HAJI MUHAMMAD SARDAR v. COMMISSIONER OF INCOME TAX, PUNJAB [1931] (I.L.R. 12 Lah. 129; A.I.R. 1931 Lah. 87; 131 I.C. 81.)

P. K. N. P. R. CHETTYAR FIRM v. COMMISSIONER OF INCOME TAX, BURMA [1930] (I.L.R. 8 RANG. 203; A.I.R. 1930 Rang. 33; 124 I.C. 267.)

RANCHODJI v. LALLU [1881] (6 Bom. 304.)

R. M. P. L. S. SIVASWAMI CHETTYAR v. COMMISSIONER OF INCOME TAX, MADRAS [1930] (A.I.R. 1930 Mad. 127; 124 I.C. 205; 57 M.L.J. 854.)

SADARAM PURANCHAND, *In re* [1931] (134 I.C. 1275; 5 I.T.C. 459; A.I.R. 1931 Cal. 729.)

S. P. K. A. A. M. CHETTYAR FIRM v. COMMISSIONER OF INCOME TAX [1930] (I.L.R. 7 Rang. 669; A.I.R. 1930 Rang. 35; 121 I.C. 790.)

Reference made by the Commissioner of Income Tax, Central Provinces and Berar under Section 66 (2) of the Income Tax Act, 1922. (Miscellaneous Judicial Case No. 19-B of 1932).

D. N. Choudhry, for the applicant.

W. R. Puranik and *A. V. Khare*, for the non-applicant.

ORDER.—This is a reference by the Commissioner of Income Tax, Central Provinces and Berar, under Section 66 (2), Income Tax Act. The facts of the case as admitted before us are shortly these. For the assessment year 1931-32 the non-applicant assessee was served with a notice under Section 22 (2) of the Act, to make a return of his income of the "previous year" by 17th August, 1931. As his accounts were not made up by then, the non-applicant applied for four months' time to submit his return, but this was refused. He then submitted a return showing a loss of Rs. 1,700. This return was not accepted as correct and a combined notice under Sections 22 (4) and 23 (2), the former for production of his account books and the latter for production of evidence on 14th October, 1931, was served on the non-applicant. On 12th September, 1931, at the request of the

non-applicant the case was adjourned to 19th October, 1931, and a fresh combined notice as before was again served on him.

On 19th October, 1931, the non-applicant, through his Court-agent, filed an application, accompanied by a medical certificate, asking for further extension of time to comply with the terms of the notice on the ground that he was unable to attend the Court in person on account of his illness. Mr. Gore, the Income Tax Officer, instead of passing any order, oral or written, on this application and communicating it to the non-applicant's agent asked him to wait and when leaving the office at 5 P.M., informed him that the order would be conveyed in due course. In the meantime the officer had proceeded under Section 23 (4) of the Act and written out the assessment order, the last part of which reads as under :—

"In the light of the foregoing facts, I cannot do otherwise than to proceed *ex-parte*. It is a patent fact that the assessee has got extensive money lending which is being done by him in several ways. In addition to this he purchases the debts of others at a comparatively small cost and reaps huge gains therefrom when the civil Court ultimately passes the decree in his favour. It need hardly be said that he can always command the best legal advice and help by virtue of his finances. Local inquiries show that his fluid resources amount to Rs. 1,00,000. He is quite easily the richest man in the District and by dint of shrewd business tactics combined with his mature experience, he has piled up a big fortune. I estimate his income at a reasonable figure of Rs. 1,00,000 and direct that he should pay tax on the same as shown in the assessment form. D. N. to issue requiring payment by 19th December, 1931."

The order sheet of that date runs as under :

"The assessee wants another date as he is indisposed *and as his munim had not returned.* No time can be allowed for such lame excuses. Order passed. D. N. to issue. Payable by 19th December, 1931."

It is conceded before us that the statement underlined (italicized) is incorrect. Notice of demand having been served on the non-applicant on 29th October, 1931, he put in an application on 14th November, 1931, for setting aside the *ex-parte* assessment

on the ground that being ill and unable "to stir out at all" he was prevented from complying with the terms of the notices served upon him under Sections 22 (4) and 23 (2) of the Act. Mr. Gore by that time having proceeded on leave the application was heard and disposed of by his successor Mr. Bagadthey. The non-applicant examined seven witnesses including himself in support of his application. While holding that the plea of illness was made out by the non-applicant which incapacitated him from attending the Court personally on the 29th October, 1931, Mr. Bagadthey rejected the application on the following ground :

"In short, the assessee merely tried to show that he was unable personally to attend the office on the day fixed. This however, cannot be considered to be a sufficient reason for his non-compliance with the terms of the notice under Section 22 (4) inasmuch as he was never called upon to appear in person. Besides the assessee could, if he had merely intended to do so, send his munim with the books, and could thus have complied with the notice. Under these circumstances I do not think I can re-open the assessment."

After this order was confirmed in appeal, the Commissioner of Income Tax, on the motion of the non-applicant, made the present reference to this Court on the following points:

"(1) Whether the Income Tax Officer was justified in assuming jurisdiction to proceed under Section 23 (4), Income Tax Act, and making *ex parte* assessment in this case when there is no legal evidence to show that the assessee deliberately failed to comply with the notice issued under Section 22 (4), Income Tax Act ?

(2) Whether the circumstances alleged and proved by the assessee could not in law be deemed to be 'sufficient cause' under Section 27, Income Tax Act ?

(3) In view of the wording of the notice under Section 22 (4) of the Act and the undisputed fact that the assessee was too ill to attend the Court and the further admitted fact that the Income Tax Officer did not pass or communicate to the assessee's servant or to the assessee any order for immediate production of account books or any other fair order, could not the assessee under law claim cancellation of the *ex parte* assessment order dated 19th October, 1931 ?

(4) Whether the procedure adopted by the Income Tax Officer in causing notices to be served under Sections 23 (2) and 22 (4), Income Tax Act, was legal and proper and whether the Income Tax Officer could under the circumstances proceed under Section 23 (4) and make *ex parte* assessment ?

(5) Is there evidence to substantiate the Income Tax Officer's reasoning in the last paragraph of the order saying that legal inquiries prove that the assessee made in the account year taxable income of a lac of rupees ?

(6) Is not the judgment of the Income Tax Officer vitiated by imaginary assumptions or irregular inquiries and hearsay evidence which the assessee has no chance to meet and which are not borne out by his account books which the Income Tax Officer could have called for ?

(7) Is the order of assessment passed by the Income Tax Officer to the best of his judgment in view of the arbitrary reasons he has given and despite the notorious trade depression and financial strain all along ? "

Points 1 and 4 require to be treated together as both of them impeach the legality of the procedure adopted by Mr. Gore in the disposal of the assessment case. As appears clear from his order Mr. Gore assumed jurisdiction to pass the summary order of assessment " to the best of his judgment " under Section 23 (4) of the Act because of the default of the non-applicant : (1) in making a return under Section 22 (2) as " the return made is not a return at all " and (2) in complying with the terms of the notices issued under Sections 22 (4) and 23 (2) of the Act. There is indeed some confusion of ideas underlying this reasoning. If the return made by the non-applicant showing a loss of Rs. 1,700 was no return at all under Section 22 (2) the issue of the combined notice under Sections 22 (4) and 23 (2) was *prima facie* redundant. The issue of such a notice pre-supposed the existence of a valid return having been made but which could not be accepted as correct without verification. Mr. Gore then must be deemed to have treated the return made by the non-applicant as valid and was clearly wrong in holding it as no return at all at the last stage of the assessment proceedings.

It is difficult for us to accept the contention of the non-applicant's learned counsel as correct that the combined notice issued in this case was illegal. The weight of authorities is decidedly against the contention: *Chandra Sen* v. *Commissioner of Income Tax, U. P.*; *Harmukhrai Dulichand* v. *Commissioner of Income Tax, Bengal*; *Commissioner of Income Tax, Burma* v. *R. M. P. Chettiar Firm* and *R. M. P. L. S. Sivaswami Chettiar* v. *Commissioner of Income Tax, Madras.* It follows then that there was non-compliance, whether deliberate or otherwise is immaterial for the purpose of Section 23 (4), on the part of the non-applicant with the terms of the notice calling for account books and evidence. Technically therefore, Mr. Gore had jurisdiction to make the summary assessment against the non-applicant under Section 23 (4) of the Act.

This does not however mean that the procedure adopted by Mr. Gore in the present case was either desirable or justifiable. Although the Act does not specifically provide for granting adjournments to comply with the terms of the notices served on the assessees under Sections 22 (4) and 23 (2), it is conceded that, in practice, adjournments are generally allowed for sufficient cause on the principle of justice, equity and good conscience. This practice has also received judicial recognition in *Commissioner of Income Tax* v. *Perianna.* It therefore necessarily follows that if, for any reason, a prayer for adjournment has to be refused a definite order, either oral or written, must be passed by the officer and communicated to the assessee or his agent, when he is present, before proceeding with the drastic action of summarily assessing him under Section 23 (4) of the Act.

In the present case if Mr. Gore had even orally communicated to the non-applicant's agent his intention of rejecting the application for adjournment and proceeding with summary assessment because the books of account had not been produced —and this is the ground on which Mr. Gore virtually based his *ex parte* assessment—it is not at all improbable that the agent might have informed the officer that he was going to comply at once with the order for the production of the account books and might have easily produced the books, in whatever state they were, from the non-applicant's house which, we are assured, was only a furlong off from the Income Tax Office and

prvented the *ex parte* assessment. Failure on the part of Mr. Gore in observing the aforesaid elementary principle of judicial procedure does, in our opinion, considerably detract from the technical legality of the summary assessment order recorded by him against the non-applicant.

As points 2 and 3 assail the legality of the orders passed by Mr. Bagadthey, in the first instance, and the Assistant Commissioner, on appeal, in proceedings under Section 27 of the Act it is convenient to consider these two points together. Both the learned Commissioner in his opinion and Rai Bahadur Chaudhri, his counsel, in his arguments contended that what constitutes sufficient cause under Section 27 of the Act being purely a question of fact this Court was incompetent to interfere with the finding that no sufficient cause for setting aside the *ex parte* assessment was made out by the non-applicant. Sufficiency of cause is certainly a question of fact dependent on the circumstances of each case. But since its determination essentially depends upon the exercise of judicial discretion, the question whether the discretion has or has not been exercised in a sound and reasonable manner in reaching the conclusion invariably involves a question of law: *P. K. N. P. R. Chettiar Firm* v. *Commissioner of Income Tax* and *Commissioner of Income Tax* v. *P. K. N. P. R. Chettyar Firm.*

It was rightly pointed out in *P. K. N. P. R. Chettyar Firm* v. *Commissioner of Income Tax, Burma*, that the words "satisfies" and " was prevented by sufficient cause " in Section 27, Income Tax Act, being practically identical with similar words occurring in Order 9, Rule 9 and Order 41, Rule 19, Civil Procedure Code, and in Section 5, Limitation Act, they must receive similar interpretation as has been put upon these words in the latter enactments. It was, however, argued by Rai Bahadur Chaudhri that these decisions are expressly overruled in *In re Abdul Bari* v. *Commissioner of Income Tax, Burma.* But this statement is not absolutely correct as the following observations, at p. 284 (of I. L. R. 3 Rang. 281) of the report of *Abdul Bari's* case would clearly show that the reference did not invite the opinion of the Full Bench on the correctness or otherwise of those decisions on the point under consideration:

" The first contention is based on a passage in the judgment of this Court in *Commissioner of Income Tax* v. *E. M. Chettyar*

Firm where it was said: 'It has, however, been held that the question whether there was any evidence on which an Assistant Commissianer or a Commissioner could come to a finding of fact is a question of law.' On the strength of that decision read with the decision in *P. K. N. P. R. Chettyar's* case a question of law will be held to arise out of the Assistant Commissioner's order if there was no evidence to support the Income Tax Officer's finding that the applicant failed to show that he was prevented by sufficient cause from complying with the notice under Section 23 (4). But in the present case there was at any rate the evidence as to the nature of the business which was contained in the accounts which applicant produced; and I would hold that the question of law, which is subject-matter of the applicant's first contention does not arise."

The question referred to the Full Bench for determination in *Abdul Bari Chowdhury's* case was:

" Whether the fact that an assessment under Section 23 (4), Income Tax Act, was entirely arbitrary involves a question of law out of the Assistant Commissioner's order passed in an appeal under the provisions of Section 30 (1) relating to appeals against the refusal of the Income Tax Officer to make a fresh assessment under Section 27, or which the High Court is entitled to regard as ground for an order under Section 66 (3)."

The reference was thus confined to the question whether the dictum laid down in *S. P. K.A.A.M. Chettyar Firm* v. *Commissioner of Income Tax* which itself was based on *Commissioner of Income Tax* v. *A.R.A.N. Chettyar Firm* reagarding the power of the High Court to call for a reference from the Commissioner under Section 66 (3) of the Act in a case in which an assessment is made under Section 23 (4), Income Tax Act, was or was not sound, and not whether a finding on the question of the sufficiency or otherwise of the cause shown under Section 27 of the Act did not involve a question of law. It therefore follows that the observations of the learned Chief Justice in the Full Bench decision that no question of law is involved in the decision that sufficient cause has not been made out in a case under Section 27 or in an appeal therefrom under Section 30 (1), Income Tax Act, were, with due respect, quite obiter. But the learned Chief Justice (at p. 300 of the

report) as well as Dunkley, J., who delivered a separate opinion (at p. 304), accepted the soundness of the dictum laid down in *Commissioner of Income Tax, Burma* v. *A.K.R.P.L.A. Chettiar Firm* at p. 27 (of *9 Rang.*) that a question of law referable for the decision of the High Court under Section 66 (2) or (3) would be involved if the finding that no sufficient cause was made out in a case under Section 27 is based upon no materials or evidence.

In *Sadaram Puranchand, In re*, it was held that the question whether, in making an *ex parte* assessment under Section 23 (4) the Income Tax Officer, did or did not "give to the assessees such reasonable opportunity as the Act requires to produce their evidence in support of their return," was a question of law which the High Court was entitled, under Section 66 (3) of the Act, to require the Commissioner of Income Tax to refer to it for decision. We therefore accept the law laid down in this Calcutta case and in *Commissioner of Income Tax* v. *P. K. N. P. R. Chettiar Firm* and *P. K. N. P. R. Chettiar Firm* v. *The Commissioner of Income Tax, Burma*, as correct. We also respectfully adopt the following observations of the learned Chief Justice in *Kichilappa Naicker* v. *Ramanujam Pillai* as laying down the test of the exercise of judicial discretion, though these observations were made with reference to a case under Section 5, Limitation Act:

"The test is, has the discretion been exercised after appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and after the application of the right principle to these facts? If a discretion is exercised under these conditions and a certain conclusion is arrived at, that conclusion, it seems to me, would be an exercise of discretion judicially sound, though an appellate tribunal might be disposed to draw a different inference from the facts."

To the same effect are the observations in *Ranchodji* v. *Lallu* and *Fatima Begam* v. *Hansi*.

We now proceed to examine how far the findings of Mr. Bagadthey and the Assistant Commissioner that the non-applicant had not shown sufficient cause for re-opening the *ex parte*

assessment, satisfies the test, that it was arrived at after the exercise of judicial discretion, as laid down in the above cases. The orders of both these officers of the income-tax department proceed on the only ground that the non-applicant, even if he was ill, could have sent his account books with his munim who has returned from "Desh" and who could have explained them to Mr. Gore on 19th October, 1930. No finding at all has been recorded on the question if sufficient cause was or was not made out by the non-applicant for non-compliance with the terms of the notice under Section 23 (2). Even in arriving at the finding that sufficient cause for non-compliance with the terms of the notice under Section 22 (4) was not made out, these learned officers have obviously left completely out of consideration several relevant facts the more important one being that if Mr. Gore had informed the non-applicant's Court agent that no adjournment would be granted, because the account books should have been sent with the munim, it was possible that compliance with the notice for the production of the books might have been forthwith made. They also failed to appreciate how far the failure on the part of Mr. Gore in observing this elementary rule had contributed to the non-compliance of the terms of this notice and seriously prejudiced the non-applicant.

Again these officers appear to have entirely ignored the non-applicant's assertion that in order to comply with the requirement of the notice under Section 23 (2) he himself had intended to go into the witness-box and swear to the accuracy of his account books. On the finding, then, that the non-applicant was unable to attend the Court on 19th October, 1930, on account of his illness, the only reasonable finding which should have been recorded by these officers was that the non-applicant had shown sufficient cause for non-compliance with the terms of the notice under Section 23 (2). On such a finding, coupled with what is already stated by us in paras. 9 and 10 above, it follows that the non-applicant had clearly made out sufficient cause for having the *ex parte* assessment reopened under Section 27 of the Act and that in recording a contrary finding the Income Tax Officer and the Assistant Commissioner failed to exercise their discretion on reasonable and proper grounds.

In view of the conclusion reached by us on the first four points it seems unnecessary, in the present case, to decide the last three points of the reference but as they were fully argued and are of vital importance to the assessees of these provinces it is well to record our considered decision thereon. These will be treated together as they appertain to the same matter, *viz.*, the legality or otherwise of the *ex parte* order of assessment, the material portion of which is already set out *in extenso* in para. 2. above. In supporting the order of the Income Tax Officer the learned Commissioner makes the following observations:

"No evidence to substantiate the Income Tax Officer's reasoning for making an *ex parte* assessment is necessary, because in this respect, the Income Tax Officer is the sole Judge. If he were to state that the assessee's total income was Rs. 1,00,000 it was enough and that would have been a correct assessment also: *Krishna Kumar* v. *Commissioner of Income Tax, Bengal.* An Income Tax Officer is not required to give any reasoning for estimating income for purposes of assessment under Section 23 (4): *vide* the Full Bench ruling of *Abdul Bari Chowdhury* v. *Commissioner of Income Tax, Burma.* If reasons are given, as is done in this case, it is only to justify the conclusions at which the Income Tax Officer has, after legal investigation, arrived and this is done to show that the estimate is not arbitrary. Even in the two preceding years the assessee has been assessed on Rs. 46,590 and Rs. 41,885 though his returns showed income of Rs. 7,800 and loss of Rs. 667, respectively."

His learned counsel also adopted the same arguments. On the contrary the learned counsel for the non-applicant cited *Muhammad Hayat-Haji Muhammad Sardar* v. *Commissioner of Income Tax, Punjab*, in support of his contention that the assessment order being based on no legal material was arbitrary and opposed to all canons of justice, equity and good conscience. He distinguished the Calcutta case on facts and contended that the law enunciated in *Abdul Bari Chowdhury's* case was not sound or at any rate not absolutely irreconcilable with the views propounded in the Calcutta and Lahore decisions so far as the interpretation of the words "to the best of his judgment" in Section 27 of the Act was concerned. In our opinion the contentions of the non-applicant's counsel are well-founded. In

In re Abdul Bari Chowdhury v. *Commissioner of Income Tax, Burma,* which overrules the previous decisions of the same Court, it was held that if the word "arbitrary" as stated in the referring order only meant that the assessment,

"did not purport to be founded on any materials or reasons beyond the Income Tax Officer's private opinion,"

there would be no question of law involved in the case so as to make it referable to the High Court for decision under Section 66 (2) or (3), Income Tax Act. The learned Chief Justice, who delivered the opinion of the Full Bench, makes this perfectly plain by observing at p. 295 of the report that:

"If that is the meaning to be attributed to the word "arbitrary," in the order of reference, I am clearly of opinion, that the answer to the questions propounded should be in the negative."

Before making these observations, however, the learned Chief Justice also made the following very weighty pronouncement at p. 294 of the report:

"Now, I am not satisfied as to the meaning that the learned Judges intended the word "arbitrary" to bear in the question propounded. If the word is taken to mean that the Income Tax Officer, regardless of information in his possession, deliberately, recklessly or fraudulently has made an assessment under Section 23 (4) which he knows that he was not justified in making, in such circumstances, and assuming that the assessee has failed to obtain redress as provided in the Act, I should not be prepared to hold, as at present advised, apart altogether from the provisions of the Income Tax Act, that this Court does not possess jurisdiction in virtue of its inherent prerogative powers to order the Income Tax Officer to do his duty."

The aforesaid observations clearly envisage the possibility of a question of law arising in an *ex parte* assessment, and its decision by a chartered High Court under its inherent powers. If this view is accepted as correct it would follow that in the provinces in which such a High Court is not established, as here, an unfortunate assessee who has suffered substantial injustice from the vagaries of the income tax authorities will have no remedy of redressing the wrong. *Muhammad Hayat-Haji Muhammad Sardar* v. *Commissioner of Income Tax, Punjab,* lays

down that in making an "assessment to the best of his judgment" the Income Tax Officer does not possess absolutely arbitrary authority to assess at any figure he likes but that he should be guided by the rules of justice, equity and good conscience, that the assessment should be reasonable and should not proceed purely on his private opinion and that an assessment resting upon the whim and caprice of the officer is not within the purview of the aforesaid section. By way of reinforcing his opinion the learned Chief Justice, at p. 142 of the report, makes the following observations:

"Suppose a person, whose income had not in the past exceeded Rs. 5,000 in any year, makes a default as contemplated by the sub-section, the Income Tax Officer would perpetrate an injustice if he took advantage of the default and assessed the income for the accounting period at a million rupees without any justification. It cannot be seriously claimed that he has made that assessment to the best of his judgment."

Finally it was observed that, "an assessment resting upon the whim and caprice of the Income Tax Officer cannot be elevated to the dignity of an assessment made to the best of his judgment," within the meaning of Section 27, Income Tax Act. To the same effect are the pronouncements in *S.P.K.A.A. Chettiar Firm* v. *The Commissioner of Income Tax* and *Commissioner of Income Tax, Burma* v. *P.K.N.P.R. Chettyar Firm.* In the latter it was observed that when the statute says that the Income Tax Officer "shall make the assessment to the best of his judgment" it means that he must make it "according to the rules of reason and justice, not according to private opinion; according to law and not humour" and that the assessment must be "not arbitrary, vague and fanciful, but legal and regular."

The same principle seems to have been affirmed in *Krishna Kumar and Mahendra Kumar Ghose* v. *Commissioner of Income Tax, Bengal*, at page 302 (of 5 I. T. C.). After the reference was remitted for formulating proper points, the Commissioner of Income Tax, Bengal, referred only the following question for decision of the High Court:

"(*b*) The Income Tax Officer simply puts 'Business Rs. 30,000.' No basis or details are apparent. Can this be an assessment to the best of one's judgment?"

The Commissioner stated the case in these words:

"The facts are that the Income Tax Officer made a local inquiry before making this assessment under Section 23 (4). He recorded a note of the details and results of his inquiry. I have seen his note which has been printed in the paper book and see no reason to suppose that the officer did not act to the best of his judgment. His note contains sufficient details to enable me to see that the assessment was according to the rules of reason and justice and not arbitrary, vague and whimsical. In my opinion, therefore, in the facts and circumstances of the case the assessment was to the best of the judgment of the Income Tax Officer, and the question should be answered accordingly."

The High Court simply answered the question in the affirmative without giving any reasons, but it is apparent that the answer would have been in the negative if the Income Tax Officer had made no local inquiry and not placed a detailed note thereof on the record in support of the assessment.

While the aforesaid remarks of the Commissioner of Income Tax, Bengal, impliedly concede that "local inquiry" and the placing on record of a note of the results of such inquiry are essential in law to sustain an *ex parte* assessment, the learned Commissioner of Income Tax of these provinces thinks otherwise, presumably on certain observations in *Abdul Bari Chowdhury's* case which go so far as to lay down that an *ex parte* assessment may as well be made on "mere guess" of the Income Tax Officer who is "the *persona designata* to make the assessment" and against whose order "no appeal lies." With due deference we hesitate to subscribe to such a widely stated proposition, as it is extremely likely to lead to certain abuse of the powers by the Income Tax Officers in the discharge of their duties which must be performed throughout in conformity with the rules of justice, equity and good conscience.

For the foregoing reasons we accept the law expressly propounded in *Muhammad Hayat-Haji Muhammad Sardar* v. *Commissioner of Income Tax, Punjab*, and the earlier Rangoon cases and impliedly accepted in *Krishna Kumar* v. *Commissioner of Income Tax, Bengal*, in preference to that laid down in *Abdul Bari Chowdhury's* case. With the greatest respect we find it

difficult to reconcile the view adopted in *Abdul Bari's* case that while a finding that no sufficient cause for setting aside an *ex parte* assessment was made out, if it is based upon " no materials or evidence " might form the subject of reference to the High Court under Section 66 (2) or (3) of the Act on the ground that it involves a question of law, a finding that an *ex parte* assessment was made to the best of the Income Tax Officer's judgment, if based on no material or evidence, though involving a question of law, could not form the subject of such a reference. We therefore hold that a point of law would invariably be involved in an *ex parte* assessment which is not shown to have been made by the Income Tax Officer " to the best of his judgment," as indicated in the next paragraph, so as to make it the subject of a reference to and decision by the High Court under Section 66 (2) or (3) of the Indian Income Tax Act.

As a result of our careful examination of the several cases noted above we deduce the following rules: (*a*) That in every case, before an *ex parte* assessment is made under Section 23 (4), Income Tax Act, the Income Tax Officer must invariably conduct such " local " inquiry to ascertain the income of the proposed assessee for the previous year as the circumstances of the case may warrant; and (*b*) that the said authority must place on the record a note of the details and results of his inquiry in order that the Commissioner of Income Tax under Section 33 or the High Court under Section 66 (2) or (3) may be in a position to see that the assessment " was according to the rules of reason and justice and not arbitrary."

It is such an assessment alone which would satisfy the requirements of an assessment by the Income Tax Officer made " to the best of his judgment " within the meaning of Section 23 (4), Income Tax Act.

It is clear to us that the *ex parte* assessment in the present case does not satisfy the aforesaid test. There is undoubtedly an undated note styled as a " report " of the Income Tax Officer on the record, but it entirely fails to indicate the materials necessary for the finding that the non-applicant's total assessable income in the " previous year " that is " Diwali 1930 ", was one lac of rupees.

The learned counsel for the Commissioner of Income Tax made no attempt before us to show how the information compiled in the above note could lead to the estimate of the non-applicant's assessable income for the year ending Diwali 1930 at Rs. 1,00,000. The remarks, which follow the figures as also those embodied in the *ex parte* order, are so vague and general in character that they could conveniently be made to fit any case. When it was known that in the preceding two years the non-applicant's assessable income did not go beyond Rs. 47,000 it was all the more incumbent on the Income Tax Officer to show how it more than doubled itself in the account year which presumably was no better than its predecessors from the point of view of the general depression of trade and industry and the consequent fall in incomes.

Such a casual and undated note cannot possibly take the place of the note of the details and results of a local inquiry which we consider necessary when an *ex parte* assessment is made under Section 23 (4) of the Act. Under these circumstances we cannot but characterise the assessment in question as one which rested merely upon the caprice of the Income Tax Officer. As such we hold that the same was not made "to the best of his judgment" within the meaning of Section 23 (4), Income Tax Act.

Our answers to the first four and the sixth points of the reference are in the affirmative and to the other two in the negative. As in our view the non-applicant is mainly responsible for his troubles in connection with the *ex parte* assessment because he did not clearly state in his application for adjournment that he himself intended to give evidence in support of his account books, he is disentitled to an award of cost in his favour in spite of the fact that he has succeeded here. We accordingly direct that the costs of this reference be borne by the parties as incurred.

Reference answered accordingly.

[IN THE PATNA HIGH' COURT].

COMMISSIONER OF INCOME TAX
v.
GOPAL SHARAN NARAIN SINGH.

Courtney-Terrel, C.J., Mohammad Noor and Varma, JJ.

April 17, 1934.

INCOME TAX—ANNUITIES—SALE OF PROPERTY—STIPULATION FOR PAYMENT OF ANNUITY FOR LIFE OF VENDOR—ANNUITY RECEIVED, WHETHER INCOME OR CAPITAL—TESTS—ENGLISH AND INDIAN LAW—AGRICULTURAL INCOME—NATURE OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 4 (3) (viii), 6 (vi).

The assessee who was the owner of an estate known as 9 annas Tikari Raj transferred practically the whole of the estate to his son-in-law's mother, who owned the remaining 7 annas share in the Raj, the consideration for the transfer being (i) *the payment of the assessee's debts amounting to Rs. 10,26,937*; (ii) *a cash payment of Rs. 4,73,063 for defraying the expenses of his daughter's marriage and* (iii) *an annual payment of Rs. 2,40,000 to the assessee during his life. It was contended on behalf of the assessee that the annual receipt of Rs. 2,40,000 was a receipt of capital and not income and that even if it were income it was agricultural income and as such not assessable to income-tax and super-tax. On a reference by the Commissioner*: Held, *by* COURTNEY-TERREL, C. J., *and* VARMA, J, (MOHAMMAD NOOR, J., *dissenting*) *that the amount of Rs. 2,40,000 received by the assessee was income and not capital and was consequently assessable to income tax and super-tax.* Held further, *that the said income was not agricultural income and was not exempt from tax.*

Per COURTNEY-TERREL, C. J.:—*An owner of capital may exchange it for an income which is taxable, or for another form of capital which is not taxable and the question whether what was obtained in exchange should be considered as taxable depends on the nature of the transaction in the particular case; and it is the substance of the transaction and not the form which is important in such cases.*

Cases referred to:

British Dye Stuff Corporation v. Commissioners of Inland Revenue [1923] (129 L.T. 538; 3 A.T.C. 532.)

Chadwick v. Pearl Life Insurance Co. [1905] (2 K. B. 507; 74 L. J. K. B. 671; 54 W. R. 78; 21 T. L. R. 456; 93 L.T. 25.)

Commissioner of Income Tax v. Shaw Wallace and Co. [1932] (59 I.A. 206; I.L.R. 59 Cal. 1343; A.I.R. 1932 P.C. 138; 136 I.C. 742; 1932 Comp. Cas. 276.)

Foley v. Fletcher [1859] (157 E.R. 678; 33 L.T.O.S. 11; (1859) 3 H. & N. 769; 28 L. J. Ex. 100; 5 Jur. N. S. 342; 7 W.R. 141.)

Jyoti Prasad Singh Deo, *In re* [1921] (6 Pat. L. J. 62; A.I.R. 1921 Pat. 103; 60 I.C. 357.)

Minister of National Revenue v. Spooner [1933] (1933 A.C. 684; 1933 I.T.R. 299; 146 I.C. 747; A.I.R. 1933 P.C. 211; 1933 A.L.J. 1428).

Perrin v. Dickson [1930] (1 K.B. 107; 98 L.J.K.B. 683; 45 T.L.R. 621; 14 Tax Cas. 608; 142 L.T. 29.)

Secretary of State v. Scoble [1903] (1903 A.C. 299; 4 Tax Cas. 618; 89 L. T. 1; 72 L. J. K. B. 617; 19 T. L. R. 550.)

Reference made by the Commissioner of Income Tax, Bihar and Orissa, under Section 66 (2) of the Indian Income Tax Act (XI of 1922). Mis. Judicial Case No. 131 of 1933.)

The facts of the case are stated in the headnote and appear more fully in the judgments of Noor and Varma, JJ.

Manohar Lal, for the Commissioner of Income Tax.

Sultan Ahmad, *S. M. Mullick*, *K. P. Jayaswal*, *D. L. Nandkeolyar*, *S. M. Imam*, *S. N. Bose* and *H. R. Kazimi*, for the Assessee.

Courtney-Terrel, C. J.—The question in this case is whether a certain life annuity acquired by the assessee is or is not assessable to income-tax. The assessee was the owner of a landed estate known as the '9 annas Tikari Raj.' He had contracted heavy debts. On 29th March, 1930, he executed a deed by which he transferred his entire interest in that estate to

the mother of the gentleman to whom his daughter had been married. The consideration for the transfer was the payment by the transferee of the transferor's debts amounting to a considerable sum, the further payment by her of the expenses of the marriage of the daughter and a life annuity of Rs. 2,40,000. The assessee at the date of the transfer was aged 47 years (the estimate by the Commissioner appears to be an arithmetical error.)

It is contended by the assessee that the life annuity payments must be considered as payment by instalments of a capital purchase sum and it is immaterial that the total amount of such capital sum will depend upon the duration of his life. Secondly, it is contended that in any case the payment should be considered as derived from the estate and therefore exempt from taxation under Section 4 (3) (viii) as agricultural income. As to the first of these points it has long been recognized that an owner of capital may exchange it for an income which is taxable, or for another form of capital which is not taxable and the question whether what was obtained in exchange should be considered as taxable depended upon the nature of the transaction in the particular case. In the leading case *Foley* v. *Fletcher* the distinction was clearly indicated. There the owner of certain buildings, lands and mines assigned the same to purchasers, who covenanted to pay a specified sum in cash and a further specified sum by annual instalments. It was held that the annual instalments were not liable to income tax. Chief Baron POLLOCK said (p. 779):

"These instalments are payments of money due as capital; the Act has made no provision for such a case. It (the Act) professes to charge profits only. . . If payments such as those in the present case are subject to income tax, whether any debt of any sort is to be repaid by annual payments, or by instalments at three or six months, it would be subject to income tax. . . If the annual payment is the repayment of principal, the return of a debt, and is not profit, it is not at all within the purview of the Act, the very title and all the provisions of which announce that it is for imposing a tax on profits. If there is the purchase of an annuity, that annuity is made chargeable in express terms. But this is not a contract to pay an annuity, but to pay a principal sum of money and the Court can only carry into effect the language of the Act."

And WATSON, B., said (p. 784):

"An annuity means where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity. Annuities are made chargeable by express words."

Now, it is argued on behalf of the assessee that this decision was based upon the English Statute enforced at that time in which annuities were expressly made assessable to income tax and it is pointed out that under the Indian Income Tax Act annuities are not expressly taxed save under Section 7, sub-Section (1 in the case of an annuity in lieu of or in addition to salary or wages). Section 6, however, after specifying certain classes of income as taxable has a concluding Clause '(*vi*) Other sources.' Furthermore, the section begins with the words:

"Save as otherwise provided by the Act, the following heads of income, profits and gains, shall be chargeable to income tax in the manner hereinafter appearing."

It was urged that the words 'profits' and 'gains' are a limitation upon the word income and that no income is taxable unless it is by way of profits or gains, and the word 'profits' used in *Foley* v. *Fletcher* is used to support this argument. But it is there used as synonymous with 'income,' and the argument is to my mind erroneous. There is no definition of income in the Act and the words 'profits and gains' are an amplification and not a limitation upon the word 'income.' Moreover, the words 'other sources' in the Indian Act indicate that anything which can properly be described as income is taxable unless expressly exempted. A long succession of cases has shown that the contrasted terms are, on the one hand, 'income' and on the other hand, 'capital.' It is not the case of a contrast between 'income' and 'profits and gains', but merely that 'profits and gains' are varieties of income. Under the Income Tax Act if an annuity is in fact an income it is chargeable to income tax unless specifically exempted. Indeed the contention for the assessee was pushed to the extent of a proposition that a life annuity purchased in the ordinary course of business from a life assurance company is not taxable, there being no express words (save under Section 7) relating to annuities. But the

difficulty and extravagance of this proposition became manifest, and on behalf of the assessee it was then urged that in this particular case the assessee should not be deemed to have purchased an annuity.

It was suggested that he had merely sold a capital estate and the purchaser had covenanted to pay the 'price' in the shape of annuity. Now, to my mind, the test of the matter does not depend upon whether there had been a 'sale' or whether the assessee is to be considered as a 'vendor' or as a 'purchaser'. It is also immaterial whether what is received by the assessee is called a 'price.' In one sense money received in exchange for something else is always the 'price'. These terms and their meaning have no bearing on the real question, which is whether the consideration to be paid by the other party to the contract is in the nature of 'capital' or is income. In the latter case it is taxable.

The nature of the transaction by which the sum which it is proposed to assess was acquired by the assessee may be examined in each case as it arises for the purpose of ascertaining the legal rights of the assessee to the payment in question. It is hardly necessary to say that it is the substance of the transaction and not the form which is important. It would be quite possible for the assessee to be given as a matter of form a right of payment by instalments of a captial sum but which nevertheless would in substance be a right to an income. For example a man may "sell" to another an estate worth a lac of rupees in consideration that the person to whom the estate was sold should pay him for a thousand years Rs. 100 annually. This disadvantageous bargain would in substance result in the vendor surrendering his position as a capitalist for that of a receiver of income.

On the other hand may be cited as an instance of the opposite condition the case of *Minister of National Revenue* v. *Spooner* where the respondent sold all her title and interest in land which she owned in freehold to a company in consideration of a sum in cash, shares in the company, and an agreement to deliver to her 10 per cent. (described as a royalty) of all oil produced from the land, and the company covenanted to carry out boring operations for oil. The company struck oil and paid

to the respondent in 1927, 10 per cent. of the gross proceeds of the oil produced which she accepted in discharge of the royalty for that year. The Supreme Court of Canada held that the sum received was not income notwithstanding the use of the word "royalty," but the residue of a capital sum and accordingly that the respondent was not chargeable to tax in respect of it. Their Lordships of the Privy Council stated that they were not disposed to disagree with the view of the Canadian Court of the transaction, and held that the contract may have taken the form which it did, because of the uncertainty whether oil would be found by the purchaser or not; as the value of the land depended on this contingency and upon the quantity of oil, found, if any, the price, not unnaturally, was made to depend in part on the result. This case was relied upon by the assessee because of the resemblance between it and his own case in the matter of the uncertainty of the purchase price.

To my mind this resemblance is entirely immaterial. The point is that their Lordships held on the facts of that case that the price received by the vendor was in the nature of capital and not in the nature of income. The argument of the assessee is moreover fallacious for, whereas in the Canadian case the value of the land depended upon the contingency that oil might or might not be found and upon the quantity so found, it cannot be said in this case that the value of the estate transferred by the assessee depended in any manner on the uncertainty as to the number of years which he might live. In the case before us the assessee, before the transaction, enjoyed the benefits of a capitalist with the burden of control of the capital. He has discarded the capital with its pleasures, burden and risks and now enjoys an income only. It is no part of the business of the Court to demarcate the boundary between two categories with mathematical certainty. The indication of the boundary need only be sufficiently distinct for the immediate problem in hand. A very ill-defined boundary line is adequate to solve the problem whether Patna is in Nepal or in India. Human ingenuity will always endeavour to defeat the law and may render it difficult to say in a given case on which side of the boundary line the transaction in question lies. In the present case there is to my

mind no such difficulty. In the case of the *Secretary of State* v. *Scoble* the Secretary of State purchased from the assessee a railway, paying in full the amount of the value of all the shares or capital stock in the Railway Company. By a clause of the contract the purchaser had the right at his option exercisable at any time to pay what was called an "annuity" at a certain fixed rate during the residue of a certain fixed term. LORD HALSBURY said:

"Was it the intention of the Income Tax Acts ever to tax capital as if it was income? I think it cannot be doubted upon the language and the whole purport and meaning of the Income Tax Acts, that it never was intended to tax capital as income at all events. Under the circumstances I think I am at liberty so far to analyse the nature of the transaction as to see whether this annual sum, which is being paid, is partly capital or is to be treated simply as income; and I cannot disagree with what all the three learned Judges of the Court of Appeal pointed out, that you start upon the enquiry into this matter with the fact of an antecedent debt which has got to be paid, and if those sums which it cannot be denied are partly in liquidation of that debt which is due, are to be taxed as if they were income in each year, the result is that you are taxing part of the capital. As I have said I do not think it was the intention of the legislature to tax capital, and therefore the claim as against part of those sums fails ..... The income tax is not and cannot be, I suppose, from the nature of things cast upon absolutely logical lines and to justify the exaction of the tax the things taxed must have been specifically made the subject of taxation, and looking at the circumstances here and the word 'annuity' used in the Acts, I do not think that this case comes within the meaning which (using the Income Tax Acts themselves as the expositors to the meaning of the word) is intended by the word 'annuity.'"

It will be noticed that their Lordships dealt with the substance and not the mere form of the contract and the rights of the assessee thereunder and moreover considered that the material question was whether, notwithstanding the use of the word "annuity" the annual sum was or was not to be considered as income. The decision in *Foley* v. *Fletcher* was moreover approved. In my opinion it is unnecessary to refer to the other

numerous examples provided by authorities quoted in the course of the argument. I can see no conflict between them in matters of principle. Enough have been examined to provide a boundary line between "capital" and "income" for the purposes of this case. The first question submitted to us is, "whether in the eye of the law the sum in question is part of the price of the property and as such is capital and so not taxable."

I would answer this by saying that the sum in question is not capital but is income and is so taxable, and it is immaterial that it is the "price" of the property transferred. The assessee further contends that in any case the income represented by the life annuity is exempted from taxation as "agricultural income." He relies upon the passages in the statement of the case by the Commissioner of Income Tax to the effect that the transaction was by way of "family arrangement" and contends that the meaning of this finding is that the contract was that the income be paid to the assessee or be raised out of the profits of the estate and be paid to him. In my opinion, the findings both of the Commissioner and the Assistant Commissioner (and it is the finding of the latter with which we are concerned) have not the meaning attributed to them by the assessee. The officers merely expressed their opinion that the assessee and the lady struck a bargain which would not have been likely save between closely connected families. It is not contended by the assessee that there is a finding that the contract was not intended to be given its full force and effect. It is just as binding as if it had been made between total strangers. The contract on the part of the lady is a personal contract to pay the specified annuity. It is true that there are terms to the effect that the assessee should have a further and collateral security in the shape of a charge upon the property transferred, but the contract for this collateral security does not affect the absolute right of the assessee to receive the annuity whether the land transferred does not produce the annual sum sufficiently to enable the lady to pay it. In these circumstances the annuity cannot be considered as "revenue derived from land which is used for agricultural purposes."

The second question submitted to us is as follows:

"In the alternative is the transfer to be deemed as family arrangement and if so is the income in question agricultural?"

I would answer this by saying that the question of whether the transfer is or is not a "family arrangement" is immaterial, and in any case the income in question is not agricultural. The assessee who has been unsuccessful throughout will pay Rs. 500 by way of costs in addition to the sum deposited by him.

MAHOMMAD NOOR, J.—The Commissioner of Income Tax has at the instance of the assessee submitted, for decision of the High Court, a statement of the case under Section 66 (2), Income Tax Act. The assessee was the proprietor of the estate known as 9 annas Tikari Raj. Under a deed of sale, dated 29th March, 1930, he transferred practically the estate, or at any rate a very large portion of it, to Rani Bhubaneshwar Kuer, who on her own right is the proprietress of the 7 annas Tikari Raj. The lady's son was married to the daughter (the only child) of the assessee. The consideration for the transfer as mentioned in the deed of sale was the payment of the debt due from the assessee amounting to Rs. 10,26,937 a cash payment of Rs. 4,73,063 to meet the expenses of the marriage of the daughter and other expenses, making a total of Rs. 15,00,000 and an annual payment of Rs. 2,40,000 during the life of the vendor. The question is whether this annual receipt of Rs. 2,40,000 by the assessee is assessable to income and super taxes. It was contended on behalf of the assessee that the payment being the consideration money of the estate sold was capital and not taxable and in the alternative it was urged that the transaction was a family arrangement and the annual payment was to be made from the income of the estate itself and was as such an agricultural income. The following questions were formulated by the Commissioner of Income Tax :

"(1) Whether in the eye of law the sum in question is a part of the price of the property and as such is capital and so not taxable ? (2) In the alternative is the transaction to be deemed to be family arrangement, and if so, is the income in question agricultural ?"

I entirely agree with my Lord that the second question must be answered in the negative. The annual receipt of Rs. 2,40,000 can in no sense be treated as agricultural income. The sale deed does not state that the payment is to be made out

of the income of the estate. It is to be made independent of any such income. No doubt, there is a provision that for this annual payment the estate sold was to remain under charge but that, as has been pointed out by my Lord, is by way of a collateral security. There is nothing in the deed, which is before us, to show that it was ever contemplated that the Rs. 2,40,000 is to come out from the estate itself. The only question, therefore, is whether this Rs. 2,40,000 per annum payable till the life of the assessee is a taxable income. If it is, it can only be if it comes under heading (vi) "other sources" of income mentioned in Section 6, Income Tax Act, which has been specified in Section 12 of the Act. This last section enacts that:

"The tax shall be payable by an assessee under the head "other sources" in respect of income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads)."

It has been contended on behalf of the Crown that this annual receipt of Rs. 2,40,000 is an annuity instead. Annuity as such has been mentioned only in Section 7 of the Act which deals with "salary or wages, any annuity, pension or gratuity and any fees, commissions, perquisites or profits received by a man in lieu of, or in addition to, any salary or wages, etc."

There is no question that the receipt under consideration does not come under "annuity" as mentioned in Section 7 of the Act. Under the English Income Tax Act an annuity is taxable as such. The language of the statute there is:

"All profits arising from interest, annuities, dividends and share of annuities payable out of any public revenue, etc., etc., and all interest of money, annuities and other annual profits and gains not charged by virtue of any other schedules contained in the Act": (Income Tax Act of 1853).

In the Indian Act, as I have said, annuities have not been expressly taxed except as salary and before an annuity can be taxed it must be shown to come within the purview of "income, profits or gains" as mentioned in Section 12, Income Tax Act. The learned advocate for the assessee placed his case rather too high when he contended that annuities were not assessable at all

in India, as they are not specifically mentioned in the Indian Act. They were assessable in England by virtue of a specific provision of law. I am however unable to agree with this contention. The omission of "annuity" in the Indian statute does not, in my opinion, affect the question. The Indian law has used a very wide term "income" and annuities are assessable provided they are income, but not if they are capital.

The question which we are called upon to answer is whether this annual receipt of money by the assessee is income as contended for by the department, or capital as urged by the assessee. If the latter, there is no doubt that it cannot be assessed. I regret that I have respectfully to differ from my Lord. In my opinion, the annual receipt is the capital price of the property sold, and not income. Though income is a very wide term signifying "what comes in," and includes any receipt, the scheme of the Indian Act, like that of the English Act, clearly excludes capital from the category of assessable income. In *In re Jyoti Prasad Singh Deo* SIR DAWSON MILLER, late Chief Justice of the Court, observed:

"Without giving an exhaustive definition it (income) may be described as the annual or periodical yield in money or reducible to a money value arising from the use of real or personal property or from labour or services rendered, bearing in mind that in some cases, *e.g.*, income derived from house property, the yield must be taken as the *bona fide* annual value and not necessarily as the annual yield."

The question for consideration is—is this receipt by the assessee derived from the employment of the capital, or is it the return of the capital itself the payment of the price having been spread over the period of the vendor's life. Whether a particular income is capital or not is always a question of fact. In *Perrin* v. *Dickson*, LORD HANWORTH, M. R., agreeing with ROWLATT, J., observed that there was no simple touchstone to be applied. Each transaction must be examined on its own merits. In that case ROWLATT, J., had, as LORD HANWORTH said, analysed and dissected the transaction.

In the case of *British Dye Stuff Corporation* v. *Commissioners of Inland Revenue* the corporation gave an American

company the right to exploit its patents and secret processes in certain territories. In return the corporation received £25,000 a year for ten years. It was held that the annual payments were income, and not repayment in instalments of the purchase price of the capital asset. ROWLATT, J., observed : (see quotations in Sundaram on Indian Income Tax. The full report is not available here) :

"It is one of those cases that just depends really on how you look at it. . . It is really using this property if you like and taking an annual return, for it roughly corresponds probably to its average life and not of sale once and for all of a capital asset."

In the Court of Appeal BANKES, L. J., says as follows :

"I do not myself think that the method of payment adopted in carrying through a transaction . . . is very much a guide to the true nature of the transaction. I read this agreement taking it as a whole as a trading convention."

I have referred to these cases in order to show that the decision does not depend at all upon the interpretation of the statute, but upon the interpretation of the transaction. A transaction may from one point of view be looked upon as an acquisition of income, and from another point of view it may be a transfer and realization of a capital value. Unfortunately in this case the department has not supplied us with sufficient materials to dissect the transaction. It would have been useful to know the value of the estate and the amount which would have secured a life annuity of Rs. 2,40,000 for the assessee who was aged 47 years on the date of the transaction. In *Perrin* v. *Dickson* already referred to, evidence was adduced before the Commissioners to show the real nature of the transaction I see no reason why the Commissioner of Income Tax did not investigate the matter further in order to ascertain how this annual payment of Rs. 2,40,000 was arrived at.

The assessee in his application to the Commissioner of Income Tax stated that the property was worth two crores. This has not been challenged; rather Mr. Manohar Lal relied upon it for the purposes of his own argument. The value of Rs. 28,80,000 (twelve times of Rs. 2,40,000) is admittedly

notional. It was stated for the purposes of paying stamp duty. If the value is really two crores, the net income of the estate could not have been less than ten lakhs of rupees per annum. In that case the debt to be paid was not at all heavy. Rupees fifteen lakhs was paid in cash and if the valuation is correct Rs. 1,85,00,000 of the value was not paid. If the assessee lives even for fifty years more he will only be realizing his capital; rather he will not be able to realize even the capital value of the estate, not to speak of any interest on it. If a man buys an annuity he expects that if he lives long he will get back more than he is investing, otherwise there is no point in buying an annuity if in no case he can get more than his capital however long he may live and will get much less if he dies early. From the transaction it is difficult to infer that the assessee was out to secure an annuity and not to sell his property. As I have said, the debt was not very large, if the value of the property has been correctly given by him in his application, the income of the estate was sufficient enough to bring him this sum of Rs. 2,40,000. One can only speculate as to the motive which led to the sale. It may be that the vendor and the vendee being the proprietors of two distinct parts of the same estate embarked upon an ambitious scheme of joining the two estates which as their names suggest were at one time parts of the same estate, namely, the Tikari Raj, and this was thought of in consequence of the marriage of the only child of the assessee with the son of the vendee, or it may be that a buyer to pay the full amount in cash was not available and the vendee was only willing to purchase on condition that the payment of the instalments would cease on the vendor's death. Be that as it may, it is unnecessary to embark upon speculations as to the motive for the sale.

We are to consider whether the assessee was out to acquire an income for himself by divesting himself of his estate, or whether he wanted to sell the estate to the vendee and make arrangement for the realisation of the price on such easy terms which may be convenient to the vendee. Taking the transaction as a whole I am forced to adopt the latter view. No doubt, at one place in the deed it is mentioned that the assessee wanted to secure an income, but in the other place he calls the charge

upon the estate "rent charge." These words are of great importance. To my mind the real nature of the transaction is that it is a sale of the estate out and out and the realisation of the price is spread over a number of years to end on the death of the assessee. The cessation of the payment of the instalment after the death of the assessee may be due to the fact that thereafter the instalment would have been payable to the daughter of the assessee who had already been provided for by her marriage with the son of the vendee and there was no point in her getting the instalment from her mother-in-law.

Though the Privy Council has pointed out in *Commissioner of Income Tax* v. *Shaw Wallace & Co.*, that it is not always right to refer to English decision on income tax in dealing with Indian cases, I wish to examine some English cases which have been referred to by my Lord. My object is to show that even in England where annuity is specifically taxable the decision of the question whether a particular receipt was or was not income has not been free from difficulty and ultimately it rested upon the decision of fact as to the nature of the transaction concerned. The first case is *Foley* v. *Fletcher*. Here Fletcher sold her half share in certain mines for £45,000, out of which £3,385 was payable in cash and the balance by half-yearly instalments of £768 and odd during the period of thirty years. It was held that the annual payment was not assessable to income tax. POLLOCK, C. B., observed as follows:

"If the annual payment is the repayment of principal, the return of a debt, and is not profit, it is not at all within the purview of the Act, the very title of the provisions of which announce that it is for imposing a tax on profits. If there is the purchase of an annuity, that annuity is made chargeable in express terms."

There is no question that had the vendor realised the money from the vendee and then purchased an annuity in the market the annuity would have been liable to income tax. In practice the effect of purchasing an annuity in the market and getting the money in the shape of an annuity from the purchaser of the property is exactly the same. But while the one is chargeable to tax the other has been held not to be so, clearly indicating that it is the form of the transaction which is to be considered,

and not its ultimate effect. It is conceded that in the present case if the amount of purchase money had been fixed and payment spread over a fixed number of years, the receipts of the annual payments would not have been assessable to tax. Another case to the same effect is the one referred to by my Lord, *Secretary of State* v. *Scoble*. LORD HALSBURY while realising difficulties in deciding a case like this held that taking into consideration the nature of the transaction it was not an annuity though it was expressly stated to be so. Mr. Manohar Lal tried to distinguish these two cases on the ground that there the amount and the period were fixed. No doubt in the present transaction there is an element of speculation, but a sale in which the price of the property sold is fixed on speculative basis is nevertheless a sale and the money received is the price of the property, and not an investment of the capital. I am unable to distinguish the present case from the one which has been referred to by my Lord, namely, the case of *Minister of National Revenue* v. *Spooner*. There a portion of the consideration money was a certain percentage of the oil produced from the land. Neither the amount was fixed nor the period. But their Lordships of the Judicial Committee agreeing with the Supreme Court of Canada held it to be capital, and not income. As I have said, I see no difference between that case and the present one except that there both the amount and the period were uncertain, here at any rate the amount is certain, though not the period. Income is something derived from capital, and not capital itself.

I am of opinion that assessment in this particular case will really be taxing capital. I am not unmindful of the fact that efforts may be made to defeat the Income Tax Act. As my Lord has pointed out, this will always be the case howsoever carefully a statute may be drafted. It is a well recognised principle that a subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown if he can do so within the law. A subject may legitimately claim the advantage of any express terms or of any omission he can find in his favour in the Taxing Acts. If the Government find that the taxing provisions are being defeated on account of some defect in the statute they can always legislate. Our duty is to apply

the law strictly. If a subject comes within the terms of the statute he must be taxed irrespective of the consequences. If he does not come, then he must be released. In this case the department has not shown that any portion of this Rs. 2,40,000 is income within the meaning of the Act. I would therefore on the materials before me answer the first question in the affirmative and hold that the annual receipt of Rs. 2,40,000 is not income within the meaning of the Act but is the price of the estate sold of which the full value was not taken cash down.

VARMA, J.—I have had the advantage of reading the judgment of my Lord the Chief Justice and that of my brother Khaja Mohammad Noor, J. The question which we have to decide is not free from difficulties. The facts of the case are that the assessee transferred the whole of his interest in the estate which is known as the 9 annas Tikari Raj by a document dated 29th March, 1930, to the wife of Raja Bahadur Harihar Prasad Narain Singh of Amawan. The consideration for the transfer was, according to the deed, the payment of the debts due from the assessee amounting to over Rs. 10,00,000 and a cash payment of Rs. 4,00,000 and odd, and an annual payment of Rs. 2,40,000 for life to the transferor. The question is whether the annual payment to the assessee is assessable to income and super taxes. The contention on behalf of the assessee is that the annual payment is payment of capital and therefore not subject to taxation, whereas the Department contends that it is income which is subject to taxation. The Commissioner of Income Tax formulated the following questions and referred the matter to this Court for decision.

"(1) Whether in the eye of law the sum in question is part of the price of the property and as such is capital and so not taxable?" and in the alternative,

"(2) Is the transaction to be deemed to be a family arrangement, and if so, is the income in question agricultural?"

I may dispose of the second question in a few words by saying that I entirely agree with the decision of my Lord the Chief Justice and my brother Khaja Mohammad Noor, J. In short, it is clear that this payment was not dependent on any

income from the estate, and therefore it could not be said to be agricultural income. The first question is one of importance and is very difficult to answer. Is the sum of Rs. 2,40,000 to be considered as income, or is it to be considered as part of capital which was being paid back by instalments? A large number of cases have been cited; but before considering those cases, it is necessary to know what is meant by "income" as used in the Income Tax Act; and for the purposes of this case, I cannot do better than to refer to the decision of the Privy Council in *Commissioner of Income Tax, Bengal* v. *Shaw Wallace & Co.*, where their Lordships of the Judicial Committee laid as follows:

"The object of the Indian Act is to tax 'income,' a term which it does not define. It is expanded, no doubt, into 'income, profits and gains,' but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. This income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as 'capital.' But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production."

Now, bearing these observations in mind, I proceed to consider the cases which have been cited on behalf of the assessee. In *Minister of National Revenue* v. *Catherine Spooner*, 20 acres of land were transferred to a company whose object was "drilling for and procuring the production and finding of oil." The transferor was to receive some cash, some shares and 10 per cent. of the petroleum, natural gas and oil recovered from the said lands free of cost. The question before their Lordships of the Privy Council was whether the value of the 10 per cent. of the petroleum, gas and oil produced in 1927 was taxable as income or not. The Supreme Court of Canada had found that it was a part of the capital and therefore not taxable; and their

Lordships of the Privy Council in dealing with the appeal by the Minister of National Revenue held that it was for the Minister to displace the view of the Supreme Court as being manifestly wrong and the Minister not having succeeded in doing so, the appeal was dismissed. In settling the price of the 20 acres of land the parties had to consider not only the value of the land but also the amount of oil that could be taken out. The quantity of petroleum was not ascertainable and therefore, it was arranged that a fixed portion of the produce would be paid to transferor. The transaction was held to be a sale and purchase. The form which it took was due to the uncertainty whether oil would be found by the purchaser or not; and as the value of the land depended on this contingency, the price was made to depend on that event. In the present case it cannot be said that the value of the property transferred could not be ascertained. In the case of *Foley* v. *Fletcher* towards the end of his judgment, POLLOCK, C. B., observed that:

"If the plaintiff had sold her estate for an annuity, so calling it, the annuity would have been liable to income-tax. But she has sold it for a sum which is payable by instalments, which is therefore not chargeable."

The case of *Foley* v. *Fletcher* mentioned above, was referred to in the case of *Secretary of State* v. *Scoble* which is also relied upon in this case on behalf of the assessee. In that case the Secretary of State for India had power by contract to purchase a railway, paying for the purchase, the full value of all the shares or capital stock of the railway company, with the option of paying instead of a gross sum "an annuity" for a term of years, the rate of interest to be used in calculating the annuity being determined in a specified way. The Secretary of State purchased the railway and exercised the option to pay an annuity instead of a gross sum. The annuity was paid half-yearly, each payment representing, as to part, an instalment of the purchase money, and as to the rest, interest on the amount of the purchase money unpaid. In those circumstances it was held that the Income Tax Acts do not tax capital as income, and that income-tax was not payable upon that part of the annuity which represented capital. From the facts of this case referred to in the judgment of the Hon'ble the Chief Justice and my

brother NOOR, J., it is clear that the period of time and the amount of money were fixed, and therefore, there was no difficulty in coming to the conclusion that the half-yearly payments were a part of the capital and not taxable income. It will be noticed in all these cases that the vendee's or transferee's liability does not cease with the life of the transferor, neither does it depend upon the life of the transferor. In the case of *Chadwick* v. *Pearl Life Insurance Co.*, WALTON, J., while discussing the law on the subject said as follows:—

"In considering this question (whether the annual payment was an annuity or an annual payment) the general scheme of the legislation as to annuities in the Income Tax Acts must be kept in mind. It is admitted that there may be, in the words of the Act, an annual payment payable as a personal debt by virtue of a contract which is not an 'annuity or annual payment' within the meaning of Section 40. If there is a sum of money owing by a debtor to his creditor, and it is agreed between them that the debt shall be paid by annual instalments, it is admitted that the annual instalments are not annual payments within the meaning of the section; further than this, it appears from *Foley* v. *Fletcher* and *Secretary of State* v. *Scoble* that where the debt and the obligation to pay the instalments are created by the same instrument the same rule applies, and the instalments are not annual payments within Section 40. It is obvious that there will be cases in which it will be very difficult to distinguish between an agreement to pay a debt by instalments, and an agreement for good consideration to make certain annual payments for a fixed number of years. In the one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by instalments; in the other, there is an agreement for good consideration not to pay any fixed gross amount, but to make a certain, or it may be an uncertain, number of annual payments. The distinction is a fine one and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum."

His Lordship went on to observe further:

"I asked the plaintiff's counsel in the course of the argument what was the gross amount payable, but I received no satisfactory answer to the question. It is plain to me that no

estimate of any gross amount was involved in the contract between the parties. What the vendors bargained for was that they should continue to receive until the end of the term the same amount of income which they were receiving from the property at the date of the assignment and that they should be paid in addition a lump sum of £ 1,000. In my judgment the annual payments of £ 1,625 were not paid as instalments of a debt, but were amounts payable and receivable as income, just in the same manner as an annuity which is payable for a certain number of years under a covenant or contract made in consideration of a sum of money paid by the annuitant as the price of the annuity. It seems to me to make no difference whether the contract to make the annual payments is entered into in consideration of money paid or in consideration of property assigned."

I rely upon the last portion of the observations quoted by me. Looking at the facts of this case it is clear that the object of the transfer was, as mentioned in the deed, to obtain for the assessee an adequate income apart from the burden of discharging his debts, just as one can arrange to purchase an annuity by paying a certain number of instalments in cash to an insurance company, which annuity is admittedly taxable. There is nothing to indicate that the annuity would cease to be taxable simply because instead of cash deposits an estate or a part of it was transferred. I am of opinion that the real object of the transfer was not to receive the capital price of the property but to secure an income for the assessee without the trouble and anxiety of managing the estate. For these reasons I would most respectfully differ from the view expressed by my learned brother NOOR, J., and I would answer the question in agreement with my Lord the Chief Justice that the sum in question is not capital but is a taxable income.

Reference answered.

[IN THE MADRAS HIGH COURT.]

COMMISSIONER OF INCOME TAX

v.

KARUPPASWAMI MOOPPANAR.

Beasley, C.J., Ramesam and Sundaram Chetty, JJ.

April 30, 1934.

INCOME TAX—ALLOWANCES—INTEREST ON BORROWED CAPITAL—DISSOLUTION OF FIRM—ONE PARTNERS TAKING OVER ENTIRE BUSINESS PAYING THE OTHER PARTNER THEIR SHARE OF CAPITAL WITH INTEREST—INTEREST PAID, WHETHER ALLOWABLE DEDUCTION—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 10 (2) (*iii*) AND 26 (2).

Where a firm was constituted of three partners and two of them retired in the year of account after receiving from the sole surviving partner their capital together with interest thereon till the date of dissolution: Held, *on a reference by the Commissioner of Income Tax, that the sole surviving partner who succeeded to the business of the firm was not entitled to deduct the interest so paid by him to the retiring partners, under Section 10 (2) (iii) read with Section 26 of the Indian Income Tax Act.*

Case stated by the Commissioner of Income Tax, Madras, under Section 66 (2) of the Indian Income Tax Act (XI of 1922), [O. P. No. 179 of 1933].

The material portion of the Order of Reference made by the Commissioner was as follows:

"2. The petitioner, S. V. Karuppaswami Mooppanar, is the Manager of a Hindu undivided family, residing at Madura within the jurisdiction of the Income Tax Officer, Madura, South Circle. The family carries on trade in yarn and grocery at Madura with a branch at Jakkampatti in the Madura District.

3. During the year of account, *Projothpathi* (24th April, 1931, to 12th April, 1932) the petitioner was a partner in the registered firm, P. A. S. V. Karuppaswami Mooppanar and Company, Madura, carrying on trade in cloth, yarn and groceries at Madura with branches at Jakkampatti and two other places. This firm was constituted under an instrument of partnership dated 1st July, 1929. According to this deed, the partners,

the capital contributed by each, and his share of profit were as follows :

		Capital.	Share of Profit
1.	S. V. Karuppaswami Mooppanar (Petitioner)	33,000	½
2.	K. Konnayandi Mooppanar	12,000	¼
3.	P. A. S. Arunagiri Mahalinga Mooppanar	21,000	¼

Further, under the terms of the said deed, interest, at such rate as might be agreed upon, was to be paid on the capital contributed as above as well as on any additional or surplus capital that might be contributed by any or all of the three partners. This firm was dissolved by a deed of dissolution dated 8th February, 1932. According to this deed the petitioner took over the yarn business at Madura and the cloth, yarn and grocery business at Jakkampatti and the other two partners took over the remaining businesses, previously carried on by the firm.

4. For the assessment of the year 1932-33 (previous year 24th April, 1931, to 12th April, 1932) the petitioner as successor to the registered firm, filed a return showing therein Rs. 10,358 as the income derived during the previous year from the businesses taken over by him from the firm. In arriving at this income the petitioner claimed to deduct Rs. 5,448 being the interest till the date of dissolution of the firm paid to the two ex-partners on the capital contributed by them to the dissolved partnership. This claim was grounded, apparently, on the fact that the partners having ceased to be partners at the time of assessment the capital put in by them should be treated as a loan to the petitioner's business and that, therefore, the interest should be allowed as a deduction under Section 10 (2) (*iii*) in assessing the petitioner as successor to the defunct firm under Section 26 (2) of the Act. The Income Tax Officer disallowed the claim on the ground that what was the capital of the business during the year of account cannot become something else at the time of assessment by reason of the fact that the petitioner took over the business of the dissolved firm. An extract from the Income Tax Officer's order is filed, maked Exhibit A.

5. The petitioner appealed to the Assistant Commissioner unsuccessfully. An extract from the Assistant Commissioner's order is filed, marked Exhibit B.

6. The petitioner now requires me to refer to the High Court the following question of law arising out of the Assistant Commissioner's order.

" When in a firm constituted by three partners two partners, retire in the year of assessment after receiving from the sole surviving partner, their capital together with interest till the date of dissolution, is not the sole surviving partner who succeeds to the business of the firm entitled to deduct the interest so paid by him to his ex-partners under Section 10 (2) (*iii*) read with Section 26 (2) of the Income Tax Act."

The question as framed contains a trifling mis-statement which, however, does not matter. The words " year of assessment " should be " year of account."

7. Sub-Section (2) of Section 26 reads as follows:

"Where at the time of making an assessment under Section 23 it is found that the person carrying on any business ....has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business............ throughout the previous year, and if he had received the whole of the profits for that year."

The section introduces a legal fiction, the object being to make the successor liable to tax on the profits, in fact made by the predecessor, as though such profits had been made by the successor. The plain meaning of the sub-section is that the place of the predecessor as the proprietor of the business during the previous year must be regarded as having been occupied by the successor, the other things remaining the same. Thus, during the period of the previous year, the predecessor's capital becomes the successor's capital, the predecessor's acts and transactions the acts and transactions of the successor, and the predecessor's profits the profits of the successor. In other words, the profits of the business have to be computed as though there had been no change and the profits arrived at treated for assessment purposes as profits made by the successor. Further, the section

specifically provides that the assessment shall be made on the successor as if he had received the whole of the profits for that year." Under Section 10 (2) interest on capital is not an admissible charge in computing the profits of any year. There is nothing in Section 26 to justify the computation of profits for the purposes of that section in any method different from that prescribed by Section 10. The fact that at the time of assessment the firm had been succeeded to by the petitioner did not convert the capital contributed by the ex-partners into borrowed capital prior to the dissolution of the partnership; and hence Section 10 (2) (*iii*) can have no application to this case. In my opinion the interest was rightly disallowed and the question should therefore be answered in the negative."

M. Patanjali Sastri, for the Commissioner of Income Tax.

T. P. Gopalakrishnan, for the assessee.

THE CHIEF JUSTICE :—The question referred is :—

"When in a firm constituted by three partners, two partners retire in the year of assessment after receiving from the sole surviving partner, their capital together with interest till the date of dissolution, is not the sole surviving partner who succeeds to the business of the firm entitled to deduct the interest so paid by him to his ex-partners under Section 10 (2) (*iii*) read with Section 26 (2) of the Income Tax Act."

The facts of the case are sufficiently stated in the order of reference and the petitioner has been unable to produce any authority in support of his contention that he is entitled as successor to the business to treat the capital of his former partners as borrowed capital and to a deduction in respect of the interest paid on it. That is not so. The plain reading of the sub-section is, in my opinion, that the predecessor's capital becomes the successor's capital and that for all purposes the succeeding partner is to be regarded as the former firm. I agree with the reasons given by the Income-Tax Commissioner for taking the view opposed to that put forward by the petitioner. The answer to the question referred, therefore, must be that the surviving partner who succeeded to the business is not entitled to deduct the interest so paid by him to his

ex-partners under Section 10 (2) (*iii*) read with Section 26 (2) of the Act. The Income Tax Commissioner will get costs Rs. 250.

SIR VEPA RAMESAM, J.—I agree.

SUNDARAM CHETTY, J.—I agree.

Reference answered accordingly.

[IN THE HIGH COURT OF MADRAS.]

COMMISSIONER OF INCOME TAX, MADRAS

v.

NARAYANA GAJAPATI RAJU BAHADUR GARU.

Beasley, C. J., Ramesam and Sundaram Chetty, JJ.

May 2, 1934.

INCOME TAX—IMPARTIBLE ESTATE—MAINTENANCE ALLOWANCE RECEIVED BY JUNIOR MEMBER UNDER AWARD—WHETHER SUM RECEIVED AS MEMBER OF HINDU UNDIVIDED FAMILY—EXEMPTION FROM TAX—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 14 (1).

The assessee who was the younger brother of the Zamindar of Kurupam was given an allowance of Rs. 6,000 per annum by way of maintenance under an award which was made the subject of a decree. After the death of the Zamindar the assessee continued to receive the allowance from his nephew who succeeded to the Zamindari: Held, *on a reference by the Commissioner, that the sum of Rs. 6,000 received by the assessee was a sum received by him as a member of a Hindu undivided family within the meaning of Section 14 (1) of the Income Tax Act and as such exempt from income tax.* Per RAMESAM, J.—*A person may be a member of a Hindu undivided family even though he may not have any coparcenary rights in the joint family property.*

Cases referred to :—

BAIJNATH PRASAD SINGH *v.* TEJ BALI SINGH [1921] (43 All. 228).

NILMONY SINGH DEO *v.* HUGOO LALL SINGH DEO [1879] (5 Cal. 256).

RAMA RAO *v.* RAJAH OF PITTAPUR [1918] (41 Mad. 778).

SARTAJ KUAR *v.* DEVRAJ KUAR [1888] (10 All. 272).

SRI RAJAH LAKSHMI DEVI GARU v. SRI RAJA SURYA NARAYANA DHATRAYA BAHADUR GARU [1897] (20 Mad. 256).

SRI RAJA RAO VENKATASURYA MAHIPATHI RAMAKRISHNA RAO BAHADUR v. COURT OF WARDS [1899] (22 Mad. 383).

YARLAGADDA MALLIKARJUNA PRASADA NAIDU v. YARLAGADDA DURGA PRASADA NAIDU [1901] (24 Mad. 147).

The material portion of the Order of Reference was as follows :—

"2. The petitioner, Sri Rajah Vyricherla Narayana Gajapathi Raju Bahadur Garu, is the second son of the late Sri Rajah Vyricherla Veerabhadra Raju Garu, Zamindar of Kurupam, an impartible Zamindari governed by the law of primogeniture. In addition to the impartible Zamin, Veerabhadra Raju possessed also certain partible properties. He died on 19th February, 1918, and his eldest son, Sri Raja Vyricherla Narasimha Surya Narayana Raju Bahadur Garu, succeeded to the Zamindari. He also died and his son is the present Zamindar. Veerabhadra Raju, the petitioner's father, before his death executed on 11th February, 1918, a will directing his eldest son, amongst other things, to pay to the petitioner, his younger son, and his male descendants a maintenance allowance of Rs. 500 per mensem from out of the impartible estate. After the death of the father, disputes arose between the petitioner and his elder brother, the then Zamindar, regarding the division of the partible properties and the validity of the will dated 11th February, 1918.

The matter was referred to arbitration and the arbitrators effected on 20th November, 1920, a division of the partible properties between the petitioner and his elder brother, declared the will to be invalid and directed that a sum of Rs. 500 per mensem should be paid as maintenance allowance to the petitioner from the impartible estate from the date of the death of the father. The award was filed in Court, and a decree in accordance with its terms was passed on 28th April, 1921. The petitioner has been in receipt of this allowance from the impartible estate of Kurupam since the award of the arbitrators; but, apart from the right to receive this allowance, the petitioner has no interest in the Kurupam Zamindari except a chance to succeed to the Zamindari in case the present Zamindar dies intestate and

without nearer heirs. The petitioner has been returning this allowance of Rs. 6,000 a year for assessment to income tax and has been assessed to tax for a number of years on this as well as the income derived from the Zamin of Chemudu which he inherited by reversionary right from his maternal grandather, after the death of his elder brother.

3. For the assessment of the year 1932-33 (previous year, official year 1931-32) the petitioner filed the return of income on 12th May, 1932, showing, amongst other items of income, the sum of Rs. 6,000 received by him as maintenance allowance from the impartible estate of Kurupam. In the course of the assessment proceedings, however, the petitioner claimed that under Section 14 (1) of the Act, the allowance received by a member of a joint Hindu family was exempt from tax, that he was an undivided member of the joint Hindu family of the Kurupam Zamindari and that therefore the maintenance allowance of Rs. 6,000 received by him as such member was exempt from tax. The Income Tax Officer overruled the petitioner's contentions for the reasons stated in his order, an extract of which is filed, marked Exhibit A.

4. The petitioner appealed to the Assistant Commissioner unsuccessfully. A copy of his order is filed, marked Exhibit B.

5. The petitioner now requires me to refer to the High Court the following question arising out of the Assistant Commissisoner's order :—

" Whether the sum of Rs. 6,000 received as maintenance by the petitioner as the brother of the late Rajah of Kurupam entitled under the law to receive maintenance out of the ancestral impartible estate of Kurupam is a sum received by him as a member of a Hindu undivided family within the meaning of Clause (1) of Section 14 of the Act ".

6. The petitioner contends :

(*a*) that though the estate of Kurupam is impartible, it is still joint Hindu family property and the provision for maintenance at the rate of Rs. 500 per mensem is made for him, and he is receiving the same, as he is the undivided member of a joint Hindu family consisting of himself and the late Rajah of

Kurupam (his elder brother) and the present Rajah of Kurupam (petitioner's elder brother's son),

(*b*) that the petitioner is entitled to be paid, and is therefore being paid, this maintenance only because the Kurupam estate, out of which it is payable, is ancestral property, and

(*c*) that although the partible properties were divided between himself and his elder brother, the late Rajah of Kurupam, that does not constitute a severance in the eye of law so far as the impartible estate is concerned.

7. I understand that it is now a well-settled principle of law that if an estate is impartible it is not joint family property at all, that the income of such an estate is the absolute and exclusive property of the holder for the time being, that the other members of the family of the holder of the impartible estate have no present rights either in the estate or in its income and that all they have is a mere chance to succeed to it in case of the death intestate of the last holder and a right to maintenance out of the estate, if proved by custom obtaining among such estates. The fact that a junior member is entitled to a maintenance allowance from the estate or that the members of the family of the holder of an impartible estate could succeed him under certain circumstances does not make either the estate or the income derived therefrom, which is the absolute and exclusive property of the holder for the time being, that of a Hindu undivided family.

If, however, it is considered that a notional Hindu undivided family should be deemed to exist for purposes of succession and maintenance, the income of the holder of the estate is not the income of this notional Hindu undivided family and the relationship between the holder of the estate and his dependants in such a family in respect of the allowances paid to the latter is not identical with that subsisting between the head of an ordinary Hindu undivided family and the junior members thereof. It appears to me that the Hindu undivided family contemplated by Section 14 (1) is the ordinary Hindu undivided family where there is community of interest and unity of possession between all the members of the family and not a notional Hindu undivided family which as such owns no property and derives no income and in which the members have no rights of ownership either of

the property or of the income. The allowance paid to the petitioner is not part of the net income of the Kurupam Zamindari; but is the income of the petitioner: [vide *Raja Bejoy Singh Dudhuria* v. *Commissioner of Income Tax, Bengal*, 60 Cal. (1029)].

I am therefore of opinion that the maintenance allowance in question is not exempt under Section 14 (1) of the Act. The question should be answered accordingly."

Patanjali Sastri, for the Commissioner of Income Tax.

The Advocate-Generl for *P. Somasundaram*, for the assessee.

RAMESAM, J.—The facts of this case are not subject of dispute. The Zamindari of Kurupam is an impartible estate in the Vizianagaram District, being one of the Zamindaris mentioned in the schedule to the Impartible Estates Act. The assessee is a brother of the last Zamindar of Kurupam (being the second son of his predecessor) and uncle of the present Zamindar who is a minor under the Court of Wards. By an award in 1920, he was given an annual maintenance of Rs. 6,000 by his elder brother; and this award was made the subject of a decree. The question now referred to us is: " Whether the sum of Rs. 6,000 received as maintenance by the petitioner as the brother of the late Rajah or Kurupam entitled under the law to receive maintenance out of the ancestral impartible estate of Kurupam is a sum received by him as a member of a Hindu undivided family within the meaning of Clause (1) of Section 14 of the Act."

This identical question has been the subject of a decision by a bench of the Allahabad High Court [since reported as *Maharaj Kumar of Vizianagram, In re*, 1934 I. T. R. 186—*Ed.*] in connection with another Zamindar in the same district, namely, Vizianagaram, and as we substantially agree with the conclusion arrived at by the learned Judges of the Allahabad High Court it is not necessary to deal with the matter very elaborately. It will be enough to indicate the salient points. The nature of an impartible estate has been the subject of consideration in a series of decisions by the Privy Council. In *Baijnath Prasad Singh* v. *Tej Bali Singh* (43 All. 228) Lord Dunedin considers these decisions and groups them in chronological order. The first group extending from 1865 to 1888 need not be referred to now.

In that year the decision in *Sartaj Kuar* v. *Deoraj Kuar* (10 All. 272) was passed by the Judicial Committee and it was held that an impartible Zamindari is alienable at the pleasure of the holder of the Zamindari. This was followed and applied in the case of a Zamindari from this Presidency, *viz.*, *Sri Raja Rao Venkatasurya Mahipathi Ramakrishna Rao Bahadur* v. *The Court of Wards* (22 Mad. 383), where it was held that the holder of an impartible estate can devise the whole of the estate or a portion of it, by will. In spite of these decisions there are other decisions passed alongside of these holding that the impartible estate still continues joint family property. It is enough to refer to one of such decisions, *viz.*, *Sri Rajah Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatraya Bahadur Garu* (20 Mad. 256). There Lord Davey observed :—

"Even if impartible it may still be part of the common family property and descendible as such............The real question, therefore, is whether it has ceased to be part of the joint property of the family of the first Zamindar."

These observations of Lord Davey were relied on with approval by Lord Dunedin in *Baijnath Prasad Singh* v. *Tej Bali Singh* (43 All. 228). The next decision to which we may refer is another decision of Lord Dunedin in *Rama Rao* v. *Rajah of Pittapur* (41 Mad 778) known as second Pittapur case. At page 784 we have got the following observations :

"It follows that the right to maintenance, so far as founded on or inseparable from the right of coparcenary, begins where coparcenary begins and ceases where coparcenary ceases."

The learned advocate for the Commissioner of Income Tax relies on this sentence and argues that, as there is no coparcenary, therefore, there is no undivided family. The inference does not follow. Though persons may have no coparcenary rights in joint family property they may still be members of an undivided family, for instance, the female members of an undivided family and disqualified heirs such as persons who are blind, deaf, dumb and so on. However, at page 785, Lord Dunedin observes :

"Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family.

Lower down he says :

"In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible Zamindari has been so often recognised that it would not be necessary to prove the custom in each case ...." For example, in the case of *Yarlagadda Mallikarjuna Prasad Naidu* v. *Yarlagadda Durga Prasada Naidu* (24 Mad. 147), the judgment says: "As to the Zamindari estate, the Board held that it was impartible and the consequence is that the plaintiffs as the younger brothers of the Zamindar retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir."

These quotations show that in the view of Lord Dunedin the right to maintenance which the son of a Zamindar still possesses is not the creature of custom but it is an incident to the ordinary joint family property which was left untouched by custom despite its encroachment on the other incidents The next quotation from *Nilmoney Singh Deo* v. *Hugoo Lall Singh Deo* (5 Cal. 256), *viz.*, "We can find no invariable or certain custom that any below the first generation from the last Raja can claim maintenance as of right" shows that beyond the first generation there is the possibility that custom has made some encroachment. Therefore, it was held by their Lordships that in each case the custom must be proved. The decisions in *Konammal* v. *Annadana* [51 Mad. 189 (P C.)] and *Shibaprasad Singh* v. *Prayag Kumari Debi* [59 Cal. 1399] do not carry the matter further. The result is, that we must find that there is a joint family property. It has been argued that the income from which the maintenance is paid belongs solely to the Zamindar but we have nothing to do with this. The question in the case is not whether the income belongs to the Zamindar or whether it belongs to the joint family of which the assessee is a member but whether the assessee received his payment as a member of a undivided Hindu family. Undoubtedly he does receive this payment of Rs. 6,000 because he is a member of the undivided Hindu family. The question must therefore be answered in the affirmative. This is substantially the same as the answer given by the Allahabad High Court. The assessee will have Rs. 250 costs from the Income Tax Commissioner and the deposit of Rs. 100 will be returned to him.

BEASLEY, C. J. :—I agree and have nothing do add.

SUNDARAM CHETTY, J. :—I agree.

Reference answered accordingly.

[IN THE MADRAS HIGH COURT.]

S. R. M. S. SUBRAHMANYAN CHETTIAR

v.

COMMISSIONER OF INCOME TAX, MADRAS.

Beasley, C. J., Ramesam and Sundaram Chetty, JJ.

May 2, 1934.

INCOME TAX—EXEMPTIONS—CASUAL AND NON-RECURRING RECEIPT ARISING OUT OF BUSINESS—NO EXEMPTION—MONEY-LENDING BUSINESS —PROFIT FROM SALE OF MORTGAGED PROPERTY—ASSESSABILITY— INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4 (3) (*vii*).

In order to claim the privilege of the exemption referred to in Section 4 (3) (vii) *of the Indian Income Tax Act it must be shown first, that the receipts in question are not those arising from business or the exercise of a profession and secondly, that the receipts are of a casual and non-recurring nature. If in a particular case the receipt can be reasonably deemed to arise from a business or the exercise of a profession it would be chargeable to income-tax, though casual and non-recurring in nature. The assessee, who was carrying on money-lending business got an assignment of a mortgage right for Rs. 4,000 in 1918. He sued in 1923 for the recovery of the mortgage amount and in satisfaction of the decree, obtained from the mortgagor certain house properties, which he subsequently sold in 1929 for Rs. 70,000. It was found that the assessee had spent only Rs. 6,376 for acquiring the properties and he was taxed on the profit made by the transaction, namely, Rs. 63,624. The assessee contended that the receipt of the sum in question did not arise in the course of any business and was of a casual and non-recurring nature and was therefore exempt from income-tax under Section 4 (3)* (vii) *of the Income Tax Act. On a reference by the Commissioner of Income Tax :* Held, *that, though the receipt was of a casual and non-recurring nature, it was a receipt arising from a transaction connected with his money-lending business and was therefore not exempt from tax under Section 4 (3)* (vii).

Cases referred to :

BALGOWNIE LAND TRUST LTD. *v.* COMMISSIONERS OF INLAND REVENUE [1930] (14 Tax Cas. 684).

BOARD OF REVENUE, MADRAS *v.* R. M. A. R. M. ARUNACHALAM CHETTIAR [1924] (I.L.R. 47 Mad. 197; 47 M.L.J. 707; 77 I.C. 216; A.I.R. 1924 Mad. 208).

COMMISSIONER OF INCOME TAX, BOMBAY *v.* SIR PURUSHOTTAMDAS THAKURDAS [1925] (87 I.C. 706; 27 Bom. L.R. 478; A.I.R. 1925 Bom. 318; 2 I.T.C. 8).

Reference made by the Commissioner of Income Tax, Madras, under Section 66 (3), Income Tax Act. [O. P. No. 99 of 1932].

The material portion of the Order of Reference was as follows:—

"2. The petitioner is a Nattukottai Chetti residing at Nemathampatti in the Ramnad District within the jurisdiction of the Income Tax Officer, Karaikudi II Circle. He carries on money-lending business at Nemathampatti, his headquarters, and at Muar in the Federated Malay States and is a partner with a ¾ths share in the S. R. M. S. Firm, Meiktila in Burma. He derives also income from property. The petitioner is assessed on his income from property, headquarter business (money-lending), on his share of the profits of the Meiktila firm and on such of the profits of the Muar business as are remitted to him in British India. The method of accountancy adopted by him in relation to his business is the cash system.

3. For the assessment of the year 1930-31 (previous year, Tamil year Sukla—13th April, to 12th April, 1930), the Income Tax Officer, besides estimating the petitioner's income from the headquarter business, proposed to include under this head Rs. 63,624, the profit derived by the petitioner from the sale during the year of account of certain house properties in Rangoon. The facts relating to the acquisition and sale of these properties are as follows:—

In 1918 the petitioner purchased from one Singaram Chettiar for a sum of Rs. 4,000 the right, title and interest of the M. L. R. M. A. Firm, Rangoon, in the mortgage of these properties executed in their favour by one S. A. Seedat in 1910. At

that time one Malladi Sathialingam claimed an interest in these properties under an equitable sub-mortgage executed in his favour by the M. L. R. M. A. Firm and this claim was under litigation in the Privy Council. If Malladi Sathialingam's appeal had been successful the petitioner's right in the mortgage would have been of little or no value. But the appeal was unsuccessful and the petitioner became entitled to all the rights of the M. L. R. M. A. Firm in the mortgage executed by S. A. Seedat in 1910. In 1923 the petitioner filed a suit in the Chief Court of Rangoon against S. A. Seedat on the mortgage of 1910 claiming a sum of Rs. 1,68,000, this being the amount of principal and interest which Seedat owed to the M. L. R. M. A. Firm on that date under the mortgage. One of the issues that arose for determination was whether the mortgage was an English mortgage or not. The Chief Court of Rangoon found that the mortgage was an English mortgage, gave a decree in favour of the petitioner for the amount and directed that Seedat should pay the amount within six months from the date of the decree (19th May, 1925) and that in default of payment within the time specified he should be debarred from his right to redeem the properties. In March 1926 the petitioner and S. A. Seedat entered into a compromise by which the properties in question which had all along been in the enjoyment and possession of Seedat came into the possession of the petitioner. The petitioner retained the properties, receiving the rents therefrom and keeping accounts for the receipts and expenditure relating to them till October, 1929, when he sold them for a sum of Rs. 70,000. The Income Tax Officer found that the petitioner had incurred a net expenditure of Rs. 6,376 in the purchase of the mortgage right and in the subsequent litigation relating to it. It is the difference between the sale proceeds of the property and the net expenditure incurred, *viz.*, Rs. 63,624 (Rs. 70,000 *minus* Rs. 6,376) that the Income Tax Officer proposed to include in the assessment of the petitioner as profit derived by him on the transaction.

The petitioner objected but the Income Tax Officer overruled his objections for the reasons stated in his order an extract of which is filed, marked Exhibit A.

4. The petitioner appealed to the Assistant Commissioner unsuccessfully. An extract of the Assistant Commissioner's order is filed, marked Exhibit B.

5. The petitioner then filed an application before me under Section 66 (2) of the Act and required me to state a case and refer 3 questions alleged to be questions of law, for the decisions of the High Court. I declined to state a case on the ground that no question of law arose. An extract of my order is filed, marked Exhibit C.

6. The petitioner thereupon moved the High Court under Section 66 (3) of the Act to direct me to refer the above 3 questions as well as 3 other questions not raised before me under Section 66 (2), for the decision of the High Court. In its order, O. P. No. 99 of 1932 dated 1st May, 1933, the High Court has directed me to refer the following question :—

"Whether the sum of Rs. 63,624 is assessable to income-tax" and I refer it accordingly for the decision of the High Court.

7. The petitioner contends that the receipt in question is the result of a solitary speculation in respect of an extremely doubtful asset unconnected with his business or profession, and that therefore it is exempt under Section 4 (3) (*vii*) of the Act. To claim exemption under this section two conditions have to be satisfied, *viz.*,—

(*i*) the income should not be one arising from business or the exercise of a profession, vocation or occupation, and

(*ii*) it should be of a casual or non-recurring nature.

The petitioner's business is to handle money-lending transactions of various kinds including mortgages. Though this was no doubt an isolated transaction, and speculative in character, one cannot say that it was essentially different in nature from his other transactions, or that it was not entered upon as a matter of business. The petitioner is a money-lender and his business is to lay out money for profit. In this transaction he saw the chance of a favourable venture, purchased the right of the M. L. R. M. A. Firm, Rangoon, in the mortgage of these properties, entered into litigation in respect of the amount due to him under the right, acquired the mortgaged properties,

retained them for a time enjoying the rents and profits and keeping account of the income and expenditure, finally sold them and realised a very large profit. All these operations taken together constitute the venture and they covered a period of 11 years. It is perhaps not possible to link this up with his other transactions and to say that it formed a part of his ordinary business or was undertaken in the course of that business. But treating it as what it is alleged to be, an isolated transaction, I am of opinion that it was nothing else than an adventure in the nature of trade, and that consequently the profit which resulted was a business profit. The term "business" as defined by Section 2 (4) of the Act includes any 'adventure or concern in the nature of trade, commerce or manufacture' and consequently, as observed by MCLEOD, C.J., in *Commissioner of Income Tax, Bombay* v. *Purushottamdas Thakurdas* (2 I. T. C. at page 11), it is not necessary that the receipt should arise from a business continuously carried on during the year to make them liable to assessment. Even if they arose from a single adventure in business they would be liable to be taxed. The mere fact that the transaction was an isolated one will not take it out of the category of chargeable profits: *Benyon Co., Ltd.* v.*Ogg* (7 T. C. 125 at 133) and (4 I.T C. 200 at 204). I am therefore of opinion that the sum of Rs. 63,624 is assessable to tax."

S. T. Srinivasagopalachari, for the assessee.

M. Patanjali Sastri, for the Commissioner.

The Judgment of the Court was delivered by SUNDARAM CHETTY, J.

JUDGMENT :—This is a reference by the Commissioner of Income Tax, Madras, under Section 66 (3) of the Indian Income Tax Act of 1922 for the decision by the High Court of the following question, *viz.*, "Whether the sum of Rs. 63,624 is assessable to income tax." The assessee is S. R. M. S. Subramanian Chettiar who is a Nattukottai Chetti, residing at Nemathampatti in the Ramnad District. He is a professional money-lender carrying on money-lending business at his headquarters (Nemathampatti) and also at Muar in the Federated Malay States. He is also a partner in a money-lending firm known as S. R. M. S. Firm, Meiktila in Burma. He was

assessed to income tax in the year 1930-31 on the basis of the income derived by him in the previous Tamil year "Sukla." One of the items of income derived is a sum of Rs. 63,624 which is stated to be the profit derived by the assessee from the sale during the year of account of certain house properties in Rangoon. The question for determination is whether this profit is chargeable to income-tax or not.

A brief statement of the facts relating to the acquisition and sale of these properties is necessary. One M. L. R. M. A. Firm, Rangoon, had a mortgage executed in their favour in 1910 by one S. A. Seedat for a sum of Rs. 80,000. The aforesaid firm appears to have effected an equitable sub-mortgage of their rights in the original mortgage-deed to one Malladi Sathialingam. The claim under the sub-mortgage was the subject of litigation in the Privy Council in 1918, when the present assessee got an assignment in his favour of the right, title and interest of the original mortgagees (M. L. R. M. A. Firm) for a sum of Rs. 4,000 from one Singaram Chetti, who had by that time become the owner of the mortgage right by reason of his purchase in Court auction in execution of a money decree obtained against M. L. R. M. A. Firm. Subsequent to this assignment in favour of the assessee, the appeal in the Privy Council in which the present assessee got himself impleaded, was decided against Sathialingam and the result was that the equitable sub-mortgage held by Sathialingam became unenforceable on the mortgaged properties, as it was found to be invalid. The encumbrance on the original mortgage right having become nil, the assessee was in a position to file a suit in the Chief Court of Rangoon in 1923 on the mortgage deed of 1910 as the assignee of the mortgagees' rights thereunder for the recovery of a sum of Rs. 1,68,3000 as the aggregate of the principal and interest due. In that suit, the transaction was found to be an English mortgage and a decree was given in favour of the assessee for the amount sued for with a direction that Seedat should pay the amount within six months from the date of the decree (19th May, 1925), and that in default of payment within the prescribed time, he should be debarred from his right to redeem the mortgage. In March 1926 the assessee entered into a compromise with the original mortgagor, whereby certain house properties in Rangoon (the

subject of the mortgage) were delivered to the assessee in satisfaction of his claim under the mortgage. He retained these properties for a few years receiving the rents and profits thereof, and keeping accounts for the receipts and expenditure relating to them till October 1929, when he sold the same for a sum of Rs. 70,000. It was found by the Income Tax Officer that the assessee had incurred a net expenditure of Rs. 6,376 for the purchase of the mortgage right and in the subsequent litigation relating to it. The difference between the sale proceeds of the properties and the outlay made by the assessee, *viz.*, Rs. 63,624 was treated as profit derived by him in this transaction and assessed to income-tax. The legality of this assessment is questioned by the assessee.

It is contended on his behalf, that the receipt of the sum in question in the year of account did not arise in the course of any business conducted by him, but it was an isolated venture, speculative and also casual or non-recurring in its nature. The question is, whether this income is exempt from income-tax under Section 4 (3) (*vii*) of the Income Tax Act of 1922. By virtue of that clause, any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, are exempt from income-tax. In order to claim the privilege of this exemption it must be shown that the receipts are not those arising from business or the exercise of a profession and that the receipts are of a casual and non-recurring nature. If in a particular case the receipts can be reasonably deemed to arise from a business or the exercise of a profession, they would be chargeable to income-tax, though casual and non-recurring in nature. Section 2, Clause 4, of the Income Tax Act runs thus:—"Business includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture." It is unnecessary to consider for the purposes of this case whether the definition given is exhaustive or not. There is no doubt that the assessee is a professional money-lender and was carrying on money-lending business in 1918, when he got an assignment of the mortgage in question for a consideration of Rs. 4,000 as stated above. The Commissioner has rightly observed that the

assessee's business is to handle money-lending transactions of various kinds including mortgages. As a money-lender, his ordinary business is to lay out moneys with a view to make a profit by advancing various loans secured and unsecured. Whatever he so lends out, would be the principal sum invested, and the various sums of interest stipulated for would be the contemplated profit. There can be no doubt that if the assessee had himself lent a sum of rupees under a mortgage bond, whatever profit he happens to derive in that transaction is a profit derived in his money-lending business. The effect of such a transaction is the creation of the relationship of creditor and debtor. By getting an assignment of a mortgage bond already obtained by another, the same result is achieved, as the assignee would be standing in the shoes of the assignor and could exercise the rights of the mortgagees, treating the mortgagor as his debtor. In the present case, the assessee virtually became the assignee of the mortgagees' rights under the mortgage bond in question, by a rather circuitous process, which however does not make his position anything different from that of an assignee of the mortgagees' rights. In fact, it was in the capacity of such an assignee of the morgagees' rights that the assessee sued upon the original mortgage bond for a pretty large amount and got such a decree as could have been passed in favour of the original mortgagees themselves. The mortgage debt due to him was determined by the decree, and instead of realising the amount directly, he took possession of the mortgaged properties in satisfaction of his claim under the mortgage bond, and after a few years, converted the same into cash by effecting a sale thereof for Rs. 70,000. That he thereby made a profit of a very large sum more or less in the nature of a windfall is a fact. Can it be said that the profit so derived by him is in respect of a transaction which is beyond the scope of the ordinary course of money-lending business carried on by him? If he becomes a mortgagee by advancing a loan on the security of immovable property any profit derived by means of such a transaction is unquestionably chargeable to income-tax as a business profit. Though at the inception, the mortgage loan was not actually advanced by the assessee, the susebquent advance of Rs. 4,000 for getting an assignment of the mortgagees' rights is certainly a venture

coming within the generally recognised ambit of the money-lending business and cannot be deemed to be so disconnected with the profession of a money-lender, as to take it out of the category of business carried on by the assessee. All that can be said is that the profit realised was extraordinary, in the sense, that it was beyond the usual expectations of a money-lender in respect of a normal money-lending transaction. The fact that a particular transaction in a money-lending business is speculative does not take it out of its category. Suppose an unscrupulous money-lender takes hold of an expectant heir or an inexperienced youth in an opulent family eager for handling money, and takes a promissory note or mortgage bond for twice the amount actually lent, and also stipulates for a high rate of interest. If he succeeds in realising the full amount due under such a promissory note or bond in the year of account, would not the profit made thereby which includes not only the stipulated interest but also an extraordinary profit which stood the risk of being disallowed in a Court of law if contested by the debtor, and was therefore speculative in nature, become chargeable to income tax? Though the transaction in question in this case may be said to be a special variety of money-lending business, it still partakes the essential characteristics of a money-lending transaction.

In one portion of his reference, the Income Tax Commissioner states that it is perhaps not possible to link this up with his other transactions and to say that it formed a part of his ordinary business or was undertaken in the course of that business. He states that though it is an isolated transaction it was nothing else than an adventure in the nature of trade and the profit so derived was a business profit. This observation led to a good deal of argument, but in the view we have taken as set forth, it is unnecessary to discuss the cases dealing with what is called an adventure in the nature of trade. If it is simply deemed to be an adventure in the nature of trade, then we have to see, as observed by the Lord President in the case of *The Balgowne Land Trust Ltd.* v. *The Commissioners of Inland Revenue* [14 Tax Cas. 684] whether it is a single plunge and if so whether it is shown to the satisfaction of the Court that the plunge is made in the waters of trade. It is only in such a case we have to see whether such speculative ventures have been systematically

carried on, and this venture is one of a series of such transactions so as to indicate a continuity in the occurrences of that kind.

In another part of the reference, the Commissioner has distinctly stated that though it is an isolated transaction speculative in character, it was not essentially different in nature from the assessee's other transactions, and it cannot be said that it was not entered upon as a matter of business. We think that this observation is correct and is the proper legal inference from the proved facts. It appears that even the initial outlay of Rs. 4,000 for the purpose of getting the assignment was out of the money which the assessee had lent to or deposited in a firm at Rangoon known as S. M. A. R., Rangoon. As observed by the Income Tax Officer this item of investment must appear in the assessee's headquarter accounts, which he however refrained from producing.

The facts of the present case bear a close resemblance to the facts of the case dealt with by the Bombay High Court in the case of *Commissioner of Income Tax, Bombay* v. *Sir Purushothamdoss Thakurdoss* [2 I.T.C. 8]. In that case, the assessee was found to be a cotton merchant. At the time of a serious crisis in the cotton market, the assessee came to be appointed under a power of attorney as an agent for the sale and disposal of all the cotton bales on behalf of the firm of Umar Sobhani. It was a venture of considerable magnitude, whereby the assessee earned a very large sum by way of commission. Though it was found to be an adventure of a casual and non-recurring nature, it was still found to be a profit connected with the business carried on by the assesssee as a cotton merchant. Any receipts arising from the buying and selling of cotton would no doubt be considered as profit arising from the trade or business of a cotton merchant. As regards the special kind of profit earned by way of commission, MACLEOD, C.J., states thus at page 11:—The argument that receipts from an extraordinary transaction connected with business, such as the one in this case, which would not be likely to occur again for many years, can be placed in the same category as receipts entirely disconnected with business or the profession or vocation or occupation of the assessee which might be considered of a

casual and non-recurring nature, cannot be accepted." This observation is very pertinent to the facts of the present case. (*Vide* also the decision of a Bench of this High Court in *Board of Revenue, Madras* v. *R. M. A. R. M. Arunachalam Chettiyar* (47 Mad. 197).

We therefore find that the sum of Rs. 63,624 is profit derived by the assessee in the year of account in respect of a transaction connected with his money-lending business, and answer the question in the affirmative. The assessee will pay the costs of the reference to the Income Tax Commissioner Rs. 250.

Reference answered accordingly.

[IN THE LAHORE HIGH COURT.]

THE PIONEER SPORTS LTD., SIALKOT

v.

COMMISSIONER OF INCOME TAX, PUNJAB AND N. W. F. P.

Addison and Sale, JJ.

June 29, 1934.

INCOME TAX—ACCOUNTING—REJECTION OF ACCOUNTS AND ASSESSMENT UNDER SECTION 13 ON INSUFFICIENT GROUNDS—INTERFERENCE BY HIGH COURT—REJECTION OF ACCOUNTS FOR OMISSION TO KEEP STOCK REGISTER—LEGALITY—PROVISO TO SECTION 13, WHEN APPLIES—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 13.

In connection with the assessment for 1931-32 the assessee company filed a return accompanied by copies of its balance-sheet and trading and profit and loss accounts. The Income Tax Officer refused to accept the profits shown by the company on the ground that 'a trading account based on an inventory not supported by a stock book can only be accepted if it discloses a reasonable rate of profit,' and estimated the profit under the proviso to Section 13 of the Income Tax Act at 30 per cent. on the miscellaneous sales and assessed the company on a profit thus computed. It appeared that the company never used to keep a stock register and the refusal of the Income Tax Officer to accept the accounts was not due to any error in the method of accounting but

because he considered the rate of profits shown to be unreasonably low. Held, *on a reference by the Commissioner, that under these circumstances the Income Tax Officer was not justified in making an assessment under the proviso to Section 13 of the Income Tax Act. The assessment should have been made under the first part of Section 13.*

Held also, *that though it has been held that the Income Tax Officer is the sole arbiter for determining under the proviso to Section 13 how the profits are to be computed, whether there is any evidence on which the Income Tax Officer could have come to the decision that the method of accounting is such that the gains could not be computed except by the arbitrary method contemplated by the proviso to Section 13, is a question of law into which the High Court is entitled to inquire.*

Reference made by the Commissioner of Income Tax, Punjab and N. W. F. P., under Section 66 (3) of the Indian Income Tax Act, XI of 1922 [Ref. No. 30 of 1933].

M. C. Mahajan, for the assessee.

Asa Ram Aggarwal, for *J. N. Aggarawal*, for the Commissioner of Income Tax.

JUDGMENT :—The Pioneer Sports Limited, Sialkot, a private limited company, carrying on business in the manufacture and sale of sport goods, with head office at Sialkot, applied to this Court under Section 66 of the Income Tax Act against the refusal of the Income Tax Commissioner to state a case arising out of assessment of tax on this company for the year 1931-32. By order* dated 5th July the Commissioner was directed to refer to this Court the following question of law :—

" Whether under the circumstances mentioned in the Order of the Income Tax Officer an assessment under the proviso to Section 13 could legally be made or whether the assessment should have been under the first part of Section 13."

The material facts of this case are that in connection with the assessment for 1931-32, the company filed a return accompanied by copies of its balance-sheet, trading and profit and loss accounts. The Commissioner states that " the assessment has been made according to the entries in the books of the

* See 1933 Inc. Tax Reports 216.

assessee with a slight variation which the Income Tax Officer considered necessary." This slight variation consisted in the fact that the Income Tax Officer declined to accept a profit of Rs. 36,943-8-6 as shown by the company's books. He framed his own estimate of 30 per cent. profit on the miscellaneous sales as shown by the company amounting to Rs. 2,00,059-8-6 and assessed the company on a profit, thus computed, of Rs. 60,015.

The reason given by the Income Tax Officer himself for not accepting the profit shown by the company is as follows:—"A trading account based on an inventory not supported by a stock book can only be accepted if it discloses a reasonable rate of profit and since the one in the case of the company's head office does not, I reject the result arrived at as being incorrect." In other words, because the Income Tax Officer considered the profits earned by the company in this case were not reasonable he computed the profits under the proviso to Section 13.

It is true that it has frequently been held by this Court that the Income Tax Officer is the sole arbiter for determining under the proviso to Section 13 how the profits are to be computed. But it is a question of law, into which this Court is entitled to enquire, whether there is any evidence on which the Income Tax Officer could come to the decision that the method of accounting is such that the gains could not be computed except by the arbitrary method contemplated by the proviso. If there was no evidence to justify the Income Tax Officer's rejection of the method of accounting in this case, it is clear that the assessment should have been made under the first part of Section 13 and not under the proviso.

It has been alleged before us, and has not been denied, that the method of accounting disclosed by the petitioner in connection with the assessment under review is the same method which has been accepted by the income tax authorities both before and after the year in question. The exception taken in this particular instance by the Income Tax Officer to the method of accounting was based on the absence of a stock register. Counsel for the petitioner has assured us, and it has not been denied on behalf of the income tax authorities that the company has never had a stock register. In this particular

case the suspicions of the Income Tax Officer were aroused by the reduced rates of profit shown by the company, and the Income Tax Officer rejected the profits shown by the company in the accounts produced on the ground that a trading account based on an inventory not supported by a stock book can only be accepted if it discloses a reasonable rate of profit. In other words, the Income Tax Officer did not attack the method of accounting adopted by the assessee but he refused to accept the profits disclosed only because he considered the rate of profits shown to be unreasonably low.

It appears to us that the Income Tax Officer went beyond his function in this case in endeavouring to lay down certain principles of business. In one part of his order he wrote:— "The decree as in this case is partly due to not charging reasonable profit on consignments sent to the London Office and partly to the low valuation of the closing stock balances." Admittedly in this case the London Office is a separate entity for the purpose of income tax assessment: and the rate of profits to be charged on consignments sent to the London Office is entirely a matter for the head office to decide. The mere fact that they may choose to charge a low rate of profit, is no reason for the Income Tax Officer to reject the total profits as stated by the company in their return. Nor is the absence of a stock register, when admittedly the company have never used a stock register, any reason for justifying the assumption of the Income Tax Officer that the profits cannot properly be deduced from the returns submitted, when there is no other reason except the fact of reduced profit to justify this assumption. The "economic blizzard", which affected trade in the year under review and still prevails, would explain reduction in profits; and unless the Income Tax Officer has some reason (other than the mere fact of this reduction) for holding that the profits and gains cannot be properly deduced from a method of accounting which admittedly has been regularly employed by the petitioner and has been accepted in the past, we are of opinion that use of the proviso to Section 13 for the purpose of introducing an arbitrary manner of computing the profits is not justified.

We hold, therefore, that there was no material on which the Income Tax Officer could in this instance assess the

petitioners arbitrarily under the proviso to Section 13. We would, therefore, answer the first paragraph of the question of law propropounded in the negative, and the second paragraph in the affirmative. We make no order as to costs.

Question answered accordingly.

[IN THE CHANCERY DIVISION.]

BENI FELKAI MINING CO., *In re.*

MAUGHAM, J.

December 6, 1933.

INCOME TAX—COMPANY—VOLUNTARY LIQUIDATION—SUBSEQUENT PROFITS—INCOME TAX—LIQUIDATOR'S REMUNERATION—PRIORITY—ASSETS INSUFFICIENT—DISCRETION OF COURT.

The liquidator of a company, after the commencement of the winding-up, carried on its business, thereby earning profits on which income tax was assessed under Schedule D, and he also received remuneration for his services. The assets, which at first appeared to be sufficient to discharge all the expenses of the liquidation, eventually proved insufficient: Held *that,* (i) *such income tax was not within the expression "fees and actual expenses incurred in realising or getting in the assets" in Rule 187, sub-Rule 1 of the Companies Winding-up Rules, 1909;* (ii) *it was one of the "expenses of the liquidation" within Section 171 of the Companies Act, 1908*; (iii) *in a winding-up, where the assets are insufficient to discharge the liabilities, the Court has a discretion to order payment of the expenses, including the liquidator's remuneration, in such order as it may think just*; (iv) prima facie, *all expenses should be paid in priority to the liquidator's salary, but the Court has power under Section 171 to provide for his remueration.*

Cases referred to :

BOYNTON, LTD., *In re*; HOFFMANN *v.* BOYNTON, LTD. [1910] (79 L.J. Ch. 247 ; [1910] 1 Ch. 519).

INTERNATIONAL MARINE HYDROPATHIC CO., *In re* [1884] (28 Ch. D. 470).

MASSEY, *Ex parte*; FREEHOLD LAND AND BRICKMAKING CO., *In re* [1870] (39 L.J. Ch. 492 ; L.R. 9 Eq. 367).

NATIONAL ARMS AND AMMUNITION CO., *In re* [1885] (54 L. J. Ch. 673; 28 Ch. D. 474).

SANITARY BURIAL ASSOCIATION, LTD., *In re* [1900] (69 L. J. Ch 551; [1900] 2 Ch. 289).

TRUEMAN, *In re*; HOOKE *v.* PIPER [1872] (41 L.J. Ch. 585; L. R. 14 Eq. 278).

WEARMOUTH CROWN GLASS CO., *In re* [1882] (19 Ch. D. 640).

Summons in a winding-up.

The Beni Felkai Mining Co. owned and worked mines and railways in Algeria under a concession from the French Government. Conditions in 1925 made it necessary in the interests of the shareholders to transfer the undertaking to two French Companies to be formed to acquire it. Cash and other assets deemed sufficient to pay the preference share capital in full were expected from the transfer. The ordinary shareholders were to be remunerated out of the proceeds of the transfer. After the scheme had been approved, the company went into voluntary liquidation, and the manager was appointed liquidator at a salary rising from £750 to £1,000 a year. The company at this period appeared to be solvent. The French companies were incorporated, agreed to adopt the scheme, and worked the mines and railways as agents for the liquidator. Adverse trade conditions in 1926 caused a fall in the value of the stocks of ore, which, on realisation, produced £1,70,239, while the disbursements of the liquidator, including his own remuneration and travelling expenses, came to £1,71,125. The concessions and assets in Algeria had not been realised. Subsequently the mine was closed and only the minimum staff retained to protect the property. The French companies having gone into liquidation, the French liquidator took possession of the assets in Algeria which would have been available for the payment of claims. In October, 1929, an assessment of £20 in respect of the sum of £100 for the year 1929-30 had been made on the company under Schedule D of the Income Tax Act, 1918. In March, 1930, £58 12s. was assessed in respect of the sum of £293 for the year 1926-27, and in October, 1930, £487 16s. was assessed in respect of the sum of £2,439 for the year 1930-31.

In this summons the Crown claimed as a creditor in respect of these sums. The actual cash in hand being insufficient to meet the claim, it was asked that the liquidator be ordered to refund these sums out of the moneys he claimed to retain as remuneration.

J. H. Stamp, for the Attorney-General, referred to TRUEMAN, *In re*, HOOKE *v.* PIPER; WEARMOUTH CROWN GLASS CO., *In re*; MASSEY, *Ex parte*, FREEHOLD LAND AND BRICKMAKING CO., *In re*; SANITARY BURIAL ASSOCIATION, *In re*.

Greenland, for the liquidator, referred to BOYNTON, LTD., *In re*; HOFFMANN *v.* BOYNTON, LTD.; NATIONAL ARMS AND AMMUNITION CO., *In re*; INTERNATIONAL MARINE HYDROPATHIC CO., *In re*.

The arguments and relevant sections of the Companies (Consolidation) Act, 1908, and Companies Winding-up Rules, appear in the judgment.

MAUGHAM, J.—This is a case of considerable difficulty, but I have formed an opinion and I consider it better to state it at once, in case the parties think fit to take the matter to another Court.

The summons is taken out by His Majesty's Attorney-General, who claims that the Crown is a creditor in respect of income tax under Schedule D. The respondent is a person who has been liquidator of the company since it went into liquidation on December 30, 1925, for the purpose of reconstruction. The claim of the Crown is to be a creditor in respect of three respective sums of £ 58 12s tax for the year 1926-27; £ 20 tax for the year 1929-30, and £ 487 16s. tax for the year 1930-31; the dates of assessment being March 25, 1930, October 8, 1929, and October 14, 1930. The peculiarity of the case is that these claims for income tax are in respect of profits earned by this company since liquidation, while it has been in the hands or under the control of the liquidator. The debts are, therefore, not provable debts. The Crown claims that the liquidator should be ordered to pay those sums out of moneys in his hands. It so happens that there are no sums at present in hand, but on the contrary, the sum of £890 is overdrawn at the bank. Technically, however, the liquidator may have sums in hand, as he has

retained remuneration at the rate of £1,000 per annum, in addition to considerable sums for travelling expenses. Counsel for the Crown suggested that those sums should be struck out of his account, and that he should be ordered out of the resulting balance to pay the three sums I have mentioned, but it is admitted that the balance, if any, which may result from an adjustment of accounts with regard to the liquidator's remuneration and travelling expenses, may be liable to a claim by the National Provincial Bank, Ltd., and this may have to be the subject of further consideration.

There are some points of construction which fall to be decided before the Court can adjudicate on this matter, and, in particular, it is necessary to consider certain sections of the Companies (Consolidation) Act, 1908—the relevant Act at the date of the liquidation of the company—and any relevant rules in the Companies Winding-up Rules, 1909. The first section to be considered is Section 171, relating to compulsory winding-up by the Court, which is as follows: "The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding-up in such order of priority as the Court thinks just." Section 196, which is one of the group of sections relating to voluntary winding-up, namely, Sections 182 to 198 is as follows: "All costs, charges and expenses properly incurred in the voluntary winding-up of a company, including the remuneration of the liquidator, shall be payble out of the assets of the company in priority to all other claims." The power of the Court under Section 171, expressed to be given in the cases of compulsory winding-up, is a power exercisable in voluntary winding-up under Section 193 of of the Companies (Consolidation) Act, 1908, under which a liquidator, contributory or creditor in a voluntary winding-up may apply to the Court to determine any question arising therein, or exercise any of the powers which the Court might exercise if the company were being wound up by the Court Rule 187 of the Companies Winding-up Rules, 1909, makes some express provisions with regard to the costs payable out of the assets, including the remuneration of the liquidator. Paragraph 1 is in these terms: "The assets of a company in a winding-up by the Court, remaining after the payment of the

fees and actual expenses incurred in realising or getting in the assets, shall, subject to any order of the Court . . . be liable to the following payments which shall be made in the following order of priority, namely: *First*—The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the Court. *Next*—The remuneration of the special manager (if any). *Next*—The costs and expenses of any person who makes or concurs in making the company's statement of affairs. *Next*—The taxed charges of any shorthand writer appointed to take an examination: Provided that, where the shorthand writer is appointed at the instance of the Official Receiver, the cost of the shorthand note shall be deemed to be an expense incurred by the Official Receiver in getting in and realising the assets of the company. *Next*—The liquidator's necessary disbursements, other than actual expenses of realisation heretofore provided for. *Next*—The costs of any person properly employed by the liquidator. *Next*—The remuneration of the liquidator. *Next*—The actual out of pocket expenses necessarily incurred by the Committee of Inspection, subject to the approval of the Board of Trade." That rule, of course, does not apply to the present case, which, as I have said, is a case of voluntary liquidation. It may, however, be useful by way of analogy, as showing what the framers of the rules considered to be the fair way of dealing with the case where the assets available were not sufficient to pay the whole of those various costs and expenses in full and to leave anything over for the creditors of the company in the ordinary way. Accordingly, as the rule is not strictly applicable and is not binding on me, I am at liberty to disregard it, if I think it just, and, in any case, the rule is expressed to be subject to any order of the Court; but I think I ought to express the opinion which I have formed that income tax incurred under Schedule D by a liquidator in carrying on the business of a company after the date of liquidation is not strictly within the words "fees and actual expenses incurred in realising or getting in the assets." It would be going too far, I think, to hold that the rule gives income tax priority over the taxed costs of a petition and a number of other costs which are intended to come early in the scale of priorities. I am more doubtful whether an income tax liability so incurred may not be within the words "the

liquidator's necessary disbursement." That however, is a matter on which, I think, I had better not express a final opinion at the present time. As I have said, this rule is not of much use to me in the present case.

I turn back to Section 171, and reading that, in connection with this case, with Section 196 of the Companies (Consolidation) Act, 1908, for the purpose of seeing whether the claim to tax, such as I have described, is one of the expenses of the liquidator, there are two things, I think, to be borne in mind. The first is that income tax under Schedule D is a necessary consequence of the acts performed by the liquidator in the course of the liquidation for the purpose of realising, as it was his duty to do, the assets of the company. In a proper case, a business has to be carried on with a view to realisation. If it is carried on, as it sometimes is, at a profit, the liability to pay income tax, in the case of an English company which is domiciled here, is necessarily incurred. The second thing to be borne in mind is that income tax is a Crown debt. That has been established for, I suppose, over fifty years. It is a tax which under Section 169, Sub-section 1 of the Income Tax Act, 1918, "may be sued for and recovered, with full costs of suit, from the person charged therewith in the High Court as a debt due to the Crown, or by any other means whereby any debt of record or otherwise due to the Crown can, or may at any time, be sued for and recovered, as well as by the summary means specially provided by this Act for levying the tax," the summary means being distraint and committal to prison. I think it is true, in the case of a liquidator, that he is not personally liable to discharge out of his own moneys income tax incurred in the way I have mentioned, and these summary methods are not available; but there remains the fact that the tax is one payable as a Crown debt, which may be sued for and recovered in the High Court as a debt due to the Crown. I have a difficulty in seeing how a liquidator who, in the course of his liquidation, carries on the business of the company at a profit, the consequence being the assessment of the company to income tax, can avoid the conclusion that this is one of the expenses in the winding-up. It is curious that in the authorities to which I have referred the phrase does not seem to have been used by the Court. In my

opinion, rates and taxes—and for this purpose I can group them together, although there is for some purposes a distinction between them—falling due subsequently to the winding-up, are part of the expenses of the winding-up. I have been referred to *International Marine Hydropathic Co., In re*; *National Arms and Ammunition Co., In re*, and other cases. As far as I can see, the Court, although it has been held that in a proper case sums of the same nature as the sums which I am considering, *e.g.*, rents falling due in respect of property held by the liquidator after the commencement of the winding-up, have got to be paid in full, has not thought fit to describe the sums in question as part of the expenses of the liquidation. On the other hand, in text-books I think such a phrase will be found. I find such a phrase, for instance, in *Palmer's Company Precedents* (13th edition), page 466. It is to be found in other editions, and I think the same phrase will be found in other text books. I do not see any particular reason for limiting the meaning of the phrase "expenses of the liquidation," or "expenses incurred in the winding-up." The term is not one of art, and I see no reason why it should not include any expenses which the liquidator might be compelled to pay in respect of his acts in the course of a proper liquidation of the company's assets. In my opinion, then, the sums in question are sums which can be properly treated as expenses in the liquidation. I should add that a debenture-holder's receiver, in a case where the receiver has been appointed by the Court, is in a different position. Such a receiver is the officer of the Court, and I can see no reason for coming to the conclusion that the liquidator in a voluntary winding-up, whose remuneration has been fixed by shareholders who may have no interest in the ultimate assets, is in the same position as an officer of the Court. The latter has his remuneration provided for in front, as far as possible, of every other payment to be made out of the assets of which the Court has assumed control. That that is not the position even of a liquidator in a compulsory winding-up appears from the rule which I have already read.

In my opinion, then, it is open to me, in the exercise of a just discretion, the assets being insufficient to satisfy the liabilities, to make on order as to the payment, out of the remaining

assets, if any, of the costs, charges and expenses, including the remuneration of the liquidator, in such order of priority as the Court may think just. Here comes in what I venture to think is the most difficult part of the task, because the facts are very exceptional, and certainly they give rise to considerations which do not exist in the ordinary sort of liquidation with which the Court is usually concerned.

The company owned and worked mines and railways and other transport facilities in Algeria under a concession from the French Government. The difficulties arising in 1925 from fluctuations in French currency made it necessary in the interests of the shareholders to transfer the business to two French companies, one a mining company, to acquire and work the mining concessions, and the other a transport company, to acquire the railway transport and shipping concession and the assets of that part of the business. There were excepted from the proposal as to transfer to the two French companies cash and other assets which it was thought would be sufficient to pay the preference share capital in full. The ordinary shareholders were going to be remunerated out of the proceeds of the two transfers. A scheme of arrangement was put forward to carry out this arrangement, and it was approved by the Court on December 18, 1925. On December 30 following, the company went into voluntary winding-up and the person who had been manager of the company was appointed liquidator at £1,000. At that time, nobody thought the company was insolvent. The two French companies were incorporated and they entered into agreements with the company for the adoption of the scheme, and the Government was applied to for the purpose of permitting a transfer of the concession to the two companies respectively. In the meantime the liquidator had paid certain sums to the preference shareholders. He had paid, I think, five shillings in all by three different payments, and the last one which was paid was on July 2, 1926. The general strike in Great Britain, which arose in that year and which caused many repercussions all over the world, made it practically impossible to carry this scheme into effect, owing to the serious fall in the value or stocks of ore, the advance of freights and the increase in costs on certain contracts. The French Companies were allowed to go into the concessions

and to work the mines and the railways and other transport facilities, as I understand it, as agents for the liquidator. The stocks of ore had been realised, and the realisation produced an aggregate of £1,70,239 8s. and the disbursements of the liquidator, including a certain sum paid for income tax in the earlier years, his own remuneration at the rate of £ 1,000 a year, payable monthly, a number of sums for travelling expenses, a number of salaries and other expenses in respect of work in Algeria, amounted in all to £ 1,71,125 11s. 4d., so that there is a deficit which is in fact represented by an overdraft at the bank, which I have already mentioned. The two concessions and the assets in Algeria have unfortunately not been realised, and before the notification of the assessment of October 14, 1930, being the assessment of the sum of £ 487 16s., under Schedule D, the liquidator had closed down the mine, paid off all the workmen and retained only the bare minimum staff for the purpose of maintaining and protecting the property and realising such assets as remained. On the other hand, the two French companies, although they passed into liquidation, occasioned the present trouble. The French liquidator took possession of the assets in Algeria which would have been available for the payment of the income tax claims, and he has claimed to be entitled thereto on behalf of the mining and transport companies respectively. That is a claim which is to me, speaking as an English Judge in the absence of evidence of French law, unintelligible. Since the date of the assessments which, I will repeat, are assessments in October, 1929, and March and October, 1930, the liquidator, as appears from the so-called trading account, which is really a cash account, has received substantial sums which I gather to be sums payable on the purchase of ore which he has realised, but I understand there are no such further sums to be received.

In substance, the question which I have got to determine seems to me to be this: whether the liquidator is entitled to retain remuneration at the rate of £ 1,000 a year, fixed, as I have already said, by the shareholders of the company, which was deemed to be completely solvent, without any provision being made for the payment of debts which I hold to be part of the expenses of the winding-up. The bankers are not here, but I assume that if they were here it would be contended that the

overdraft due to them as the result of the liquidator's trading is also an expense of the winding-up. *Prima facie* and in a normal case, my opinion is that the whole of the expenses of the winding-up ought to be paid before the remuneration of the liquidator. It seems to me, in the normal case, expenses which he has incurred, whether by the employment of agents, or, for example, in respect of gas and electric light, or for rents or any other of the numerous expenses which he may incur in the winding-up of a company, are things for which he is bound to provide out of the assets of the company, as far as he is enabled to recover them. If his position is that, having provided for them, there will be no remuneration left for him, then he is entitled to say: "I cannot go on unless the creditors or share-holders or others will put up a fund for my benefit." He is the person who can see what the position is. The people to whom the company in liquidation has incurred a liability for expenses have not got the materials which he has for ascertaining the true position. There may, however, be cases in which the Court under the power which I hold the Court has under Section 171 of the Companies (Consolidation) Act, 1908, will provide for the liquidator's remuneration to the extent to which that remuneration ought to be given for services which he has rendered by way of salvage, in a case where the realisation of property has been long delayed or has become impossible. Nor do I think the Court ought to be unwilling to declare that the liquidator is entitled to retain the remuneration which he has paid himself out of the assets of the company at a time when he had no reason to suppose that there would be an insufficient amount available for the payment of the costs, charges and expenses incurred in the winding-up. In my opinion, it is impossible on the materials before me to fix exactly the date as from which the remuneration of the liquidator ought to be inquired into; but I think I am justified, on the whole, in making an order that the liquidator's remuneration received by him or paid to himself before December 8, 1930—that being the date of the assessment of £487 16s.—shall not be disturbed. I propose to direct an inquiry as to what remuneration is proper to be allowed to the liquidator for the period subsequent to that date in respect of services rendered which may fairly be regarded as necessary for the preservation of the property belonging to the company.

Solicitors—Solicitor of Inland Revenue, for the applicant; *Rowney & Co.*, for the respondent.

[IN THE PRIVY COUNCIL.]

F. E. DINSHAW

v.

COMMISSIONER OF INCOME TAX, BOMBAY.

Lord Tomlin, Lord Russell of Killowen, Lord Macmillan, Sir Lancelot Sanderson and Sir Shadi Lal.

June 22, 1934.

INCOME TAX—BAD DEBT—DEBT DUE FROM JOINT STOCK COMPANY.

It is not necessary to constitute moneys due by a joint stock company, a bad debt or a business loss to the creditor, that the company should be actually wound up or have ceased to be a going concern. Whether a debt is wholly or partly and to what extent, bad or irrecoverable is in every case, and whether the debtor is a human being or a joint stock company or other entity, a question of fact to be decided by the appropriate tribunal upon a consideration of the relevant facts of that case. There is no justification for the suggestion that a practice should prevail in the Commissioner's office under which a debt due from a limited company which is still a going concern, is incapable of being treated as a bad debt.

The decision of the Bombay High Court in *Commissioner of Income Tax, Bombay* v. *F. E. Dinshaw* (I.L.R. 56 Bom. 457; 1933 Comp. Cas. 9) reversed.

Appeal against the Order of the Bombay High Court (BEAUMONT, C. J., and MIRZA, J.), dated March 7, 1932, reported as 1933 Comp. Cas. 9; I.L.R. 56 Bom. 457.

Wilfrid Greene, K. C. and *R. P. Hills*, for the appellant.
A. M. Dunne, K. C. and *W. Wallach*, for the respondent.

LORD RUSSELL OF KILLOWEN.—The point raised by this appeal is short and free from complication. The exact facts are

in some respects a little difficult to ascertain but for present purposes they may be accurately stated thus :—

The appellant is a member of a firm who acted as agent for a limited company which carried on the business of a cotton mill.

The appellant was assessed to income-tax under the Indian Income Tax Act, 1922, for the year 1929-30 on the basis of his income for the preceding year 1928-29. In that preceding year the firm had, under guarantees given by them, been compelled to pay and had paid to the lenders large sums which had been advanced to the limited company, and which the limited company had failed to re-pay. As a result, the limited company became immediately indebted to the firm in a large sum, the share of the appellant therein being the sum of Rs. 1,73,500. It was alleged by the appellant that this indebtedness was irrecoverable from the limited company, and he claimed to have the said sum of Rs. 1,73,500 allowed to him as a reduction in arriving at his assessment to income-tax.

It does not seem to have been disputed in India, and it was not disputed before their Lordships' Board, that if this debt of the limited company was in fact irrecoverable, or in other words, was a bad debt, the appellant would be entitled to the deduction which he claimed.

Those being the facts, the dispute which has arisen and which has now come before their Lordships, on appeal to His Majesty in Council is whether the debt, being a debt due from a limited company, can in law be treated as a bad debt so long as the limited company is not actually wound up or has not ceased to be a going concern.

The Assistant Commissioner, by his order of January 15, 1930, stated that "so long as the mill is working it is impossible to say that the money advanced by the assessee therein can be regarded as bad debts," and he disallowed the claim for deduction. With this decision the Commissioner declined to interfere. From documents in the subsequent proceedings it appears that the Commissioners acted upon the view that the Assistant Commissioner's decision was based, not on a matter of law, but purely on a finding of fact on the evidence before him. In this

their Lordships think that the Commissioner was mistaken and indeed the later history makes this clear.

By an order of the High Court of Bombay dated January 30, 1931, and made under Section 66 of the Indian Income Tax Act, 1922, the Commissioner was compelled, somewhat reluctantly, to state a case upon the question of law which had arisen and to refer it to the High Court.

The question which the Commissioner was directed to raise by the case stated was :—

" Whether it is necessary to constitute moneys due by a joint stock company a bad debt or a business loss to the creditor that the company should be actually wound up or have ceased to be a going concern."

In the case as stated the Commissioner expanded this question and added another question dealing with the specific sum in dispute : but the High Court's answer to the reference had ignored the Commissioner's additions. The order of the High Court (dated March 7, 1932), was in the following terms :—

" For the reasons stated in the accompanying judgment, the Court answers the Reference by saying that to constitute moneys due by a joint stock company engaged in business a debt or a business loss to the creditor, it is necessary that the company should have ceased to be a going concern."

" The assessee must pay the costs on the Original Side scale to be taxed by the Taxing Master, Original Side."

The learned Chief Justice confined his judgment to companies which were carrying on business and held (i) that so long as the company was on the register and so long as it was carrying on business as a going concern, it is impossible to say that any debt which it owes is necessarily irrecoverable ; (ii) that the Income Tax Officer was entitled to decline to go into evidence as to the value of the assets or extent of the liabilities of the company and (iii) that to constitute moneys due by a company a bad debt or a business loss to the creditor, it is necessary that the company should have ceased to be a going concern.

Their Lordships know of no principle or authority upon which these views of the learned Chief Justice can be supported,

Whether a debt is wholly or partly and to what extent bad or irrecoverable is in every case (and whether the debtor is a human being or a joint stock company or other entity) a question of fact to be decided by the appropriate tribunal upon a consideration of the relevant facts of that case. There is no justification for the suggestion that a practice should prevail in the Commissioner's office under which a debt due from a limited company which is still a going concern, is incapable of being treated as a bad debt.

Their Lordships are of opinion that the order of the High Court should be discharged and in lieu thereof an order should be made answering in the negative the question which the Commissioner was directed to raise and which is set out above. As a result the appellant's assessment and his claim to the deduction, will have to be reconsidered by the appropriate authority in the light of all relevant evidence.

Their Lordships will humbly advise His Majesty accordingly. The respondent must pay to the appellant his costs of the proceedings here and in the High Court of Bombay.

A petition was presented to their Lordships' Board praying that an affidavit relating to the assessments made upon the appellant for later years might be referred to upon the hearing of the appeal. Their Lordships are of opinion that no order should be made on that petition as to costs or otherwise.

Appeal allowed.

[IN THE LAHORE HIGH COURT.]

L. N. GADODIA & Co., *In re.*

Addison and Sale, JJ.

June 29, 1934.

INCOME TAX—DEDUCTIONS—LOSS OF BUSINESS COLLECTIONS BY ROBBERY WHETHER CAPITAL LOSS OR LOSS OF INCOME—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 10 (2).

The assessees' sources of income were import and sale of piece-goods, commission agency, interest on securities, dividends and property. During the year of account certain dacoits armed

with pistols had with the assistance of an employee of the assessee entered the assessee's office where the cashier and the munim *were counting and totalling the realisations of the day and carried away Rs. 14,440 by force. There was no evidence to show that the assessee carried on money-lending business or banking though he used to receive moneys from others on interest and use the same in his business. The assessee claimed that in computing his profits this sum of Rs. 14,440 should be deducted. On a reference by the Commissioner:* Held, *that in view of the nature of the assessee's business the money carried away could not be regarded as his stock in trade; nor was it expenditure necessary for carrying on the assessee's business or for the purpose of earning the receipts. The loss was clearly a loss of capital and no allowance could be made for it, as it did not fall within any of the clauses referred to in Section 10 (2) of the Income Tax Act.*

Cases referred to:

GRESHAM LIFE ASSURANCE CO. *v.* STYLES [1892] (1892 A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479; 3 Tax Cas. 185).

RAMASWAMI CHETTIAR *v.* COMMISSIONER OF INCOME TAX, MADRAS [1930] (I.L.R. 53 Mad. 904; 59 M.L.J. 403; 127 Ind. Cas. 611; A.I.R. 1930 Mad. 808).

Case referred under Section 66 (2) of the Income Tax Act (XI of 1922), by the Commissioner of Income Tax, Punjab, North West Frontier and Delhi Provinces.

Kishen Dayal, for the assessee.

Asa Ram Aggarwal for *Jagan Nath Aggarwal*, for the Commissioner of Income Tax.

JUDGMENT.—On an application under Section 66 (2) of the Income Tax Act, a reference was made by the Commissioner of Income Tax to this Court on the 5th September, 1932, for a decision of the following question of law:—

"Whether the sum of Rs. 14,440 lost in cash, as a result of dacoity on the assessee's firm by an employee with the assistance of and in collusion with others, is a deduction which can be set off in computing the profits of the firm?"

This case has a long history. The reference was sent back by this Court with a direction to state specifically the facts on which it was made, that is to say, the Commissioner was

directed to report whether the facts mentioned in paragraph 2 of the petition and the affidavit of the assessee were correct and in what respect. The following remarks also occur in the order of this Court :—

" It appears that the Commissioner, the Assistant Commissioner and the Income Tax Officer have all proceeded on the assumption that the assessee carried on business of import and sale of piece-goods. The learned Commissioner did not deal with the objections of the assessee to the effect that he did money-lending and banker business as well and the learned counsel who has appeared for him before us is not prepared to make a statement as to the correctness or otherwise of the facts mentioned by the assessee in question No. 2 which he had asked the Commissioner to refer to this Court. In our opinion the facts stated in this question are vital for a correct answer to the reference and the Commissioner should have dealt with them in more detail."

The Commissioner of Income Tax has again reported the facts which are as follows :—

Since the year 1923-24 the assessee's sources of income chargeable to income tax have never been noted to be more than import and sale of piece-goods, commission agency, interest on securities, dividends and property. There is no suggestion whatever on the record that the assessee was at any time engaged in moneylending business as well. When the assessment for the year 1931-32 was under consideration, the assessee claimed a deduction of Rs. 14,440 on account of loss of cash by a dacoity, the circumstances surrounding which were described by the assessee as follows :—

" At 9 P.M. on the 6th July, 1930, certain persons along with Bishamber Dayal, an employee of the assessee, entered the office where the cashier and the *munim* were counting and totalling the realisations from the business of the day and were engaged in their daily routine work incidental to the business of the assessee. The intruders at the point of their pistols demanded money, currency notes, etc., with the cashier and they were compelled to do so." "From the facts given," the account continues, "it is clear that the assessee was deprived of his money as a result of political commotion and the crime was

perpetrated by Bishamber Dayal in collusion with and with the assistance of other persons." The petition of the assessee continues as follows :—

The above circumstances give rise to the following inferences :—

"(*a*) That the assessee suffered this loss during his usual business hours in business premises.

(*b*) That the employees were engaged in work incidental to the business of the assessee.

(*c*) That the accident occurred on account of some neglect of the cashier and the *munim* and was done through the agency of Bishamber Dayal.

(*d*) That the loss consisted of realizations of the day for the business transacted."

For these reasons, it was claimed that the loss suffered by the assessee was a loss incidental to the business and should be allowed for in computing the income tax. In the opening lines of this petition, it was stated that the assessee was a firm carrying on business of piece-goods, banking, financing, etc., at Kucha Natwan, Delhi, and other places. On this the Income Tax Officer had noted, "No banking, financing pertains to assessee's own branches."

Having considered this memorandum, the Income Tax Officer disallowed the claim, stating that it was not a case of embezzlement or of loss of stock-in-trade, but it was clearly a loss of capital.

There was an appeal to the Assistant Commissioner of Income Tax on the following grounds :—

(1) That the learned Income Tax Officer should have computed the profits and gains of the assessee in accordance with reasonable business methods.

(2) That he should have held that the loss of the sum of Rs. 14,440 was a loss of his stock-in-trade.

(3) That he should have held that this loss accrued to the assessee through the agency of Bishamber Dayal and on account of neglect on the part of the *munim* and the cashier of the assessee.

(4) That he was wrong in holding that the loss was a loss of capital.

There was no allegation that the assessee claimed the loss as a money-lender or banker. The Assistant Commissioner dismissed the appeal and said that the stock-in-trade of the assessee was not cash but piece-goods and various other articles of Indian manufacture.

This was a definite finding of fact which apparently was not disputed by the assessee when he put in his application under Section 66 (2) of the Income Tax Act, asking the Commissioner to state a case on the questions involved for a decision of this Court. The Commissioner has remarked that at no stage of the proceedings before the income-tax authorities did the assessee contend that the loss had occurred in connection with his business as money-lender or banker. The same findings were repeated by the Commissioner in the statement of the case to this Court and it was only when the Commissioner sent his draft statement of the case to the assessee that the latter put in an affidavit alleging that he carried on business in money-lending as well. The Commissioner refused to accept this affidavit as it was fresh evidence and had not been produced before the income-tax authorities. He informed the assessee to this effect and forwarded the reference to this Court as it stood. This Court, however, sent back the case for further findings as already indicated. These further findings were directed to be as regards the question whether he carried on the business of a money-lender or banker.

On receipt of the direction of this Court, the Commissioner caused further enquiry to be made by the Income Tax Officer who made a report which is Appendix C. This report is based on an examination of the assessee's account and is to the effect that the assessee does not carry on money-lending business and that cash does not form the assessee's stock-in-trade. It has also been found that owing to the prominent social position and prosperous financial condition of the assessee he is entrusted with a lot of money by people to whom the assessee pays interest, the money apparently being employed in the business.

On these facts, it is clear that the allegation of the assessee that he carried on money-lending and banking business is false. The learned counsel appearing for the assessee admitted that none of the allowances in sub-Section 2 of Section 10 of the Income Tax Act covered the present case. He relied simply and solely on sub-Section 1 of Section 10 which is to the effect that the tax should be payable by the assessee under the head " business " in respect of the profits and gains of any business carried on by him. He admits that had the assessee been carrying the money in his own pocket, he could not have claimed a deduction but he stated that as it was stolen from the office it was legitimate deduction for the purpose of calculating the net profit accruing to the firm.

At page 121 of KONSTAM'S LAW OF INCOME TAX, 5th Edition, occurs the following passage :—

" There are also specific prohibitions against the deduction, in computing profts, of any loss not connected with or arising out of the trade or profession ; in order to be deducted the loss must be in the nature of a commercial loss, and therefore damages for personal injuries due to the negligence of the traders' servants, and penalties for breaches of the customs laws are not to be deducted, nor is a loss by defalcation, or by excessive drawings on the part of a director, such payments are not necessarily incurred, nor do they form a necessary risk, in earning the profits."

It follows that this loss of Rs. 14,440 by armed dacoits cannot be deducted. It was not necessarily incurred nor did it form a necessary risk in earning the profits. It was not a loss in the nature of a commercial loss.

In *Gresham Life Assurance Co.* v. *Styles* LORD HALSBURY said :—

" The thing to be taxed is the amount of profits and gains. The word ' profits ' I think is to be understood in its natural and proper sense, in a sense which no commercial man would misunderstand."

There is a decision of a Special Bench of the Madras High Court reported in *Ramaswami Chettiar* v. *Commissioner of Income Tax, Madras* (I. L. R. 53 Mad. 904). Two of the Judges held that the loss incurred by theft of money due to

a money-lending business and in the business premises should not be allowed for in computing the income-tax, where the theft was committed by persons who were not at the time of the offence employed as clerks or servants in the business of the assessee. The third Judge dissented. He apparently held that in a money-lending business cash might be looked upon as the stock-in-trade. At page 910 of this report is given the following remark of LORD HERSCHELL:

"The profit of a trade or business is the surplus by which the receipts from trade or business exceeded the expenditure necessary for the purpose of earning those receipts."

It cannot be said that this was expenditure necessary for the purpose of earning the receipts of the business carried on by the assessee.

This is the case of an assessee who carried on business in piece-goods and for that purpose accepts deposits from various people and pays interest on those deposits, the money being used in the business. No money-lending business is carried on, so that, if there is any force in the contention that money would be the stock-in-trade of such a business, it does not arise in the present case. It is certainly not the stock-in-trade of the business described, nor was it expenditure necessary for carrying on the business or for the purpose of earning the receipts. The loss was clearly a loss of capital and no allowance can be made for it, while it was not claimed that it fell within any of the allowances given in Section 10 (2) of the Act.

For the reasons given, we would answer the question stated in the negative. The assessee will pay the costs of the Commissioner of Income Tax. Counsel's fee Rs. 100.

Reference answered in the negative.

[IN THE HIGH COURT OF LAHORE.]

RULIA MAL-RAUNAK RAM

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June 22, 1934.

INCOME TAX—REFERENCE—QUESTION OF LAW—BAD DEBT—DECISION OF INCOME TAX OFFICER HOW FAR FINAL—ASSESSMENT UNDER PROVISO TO SECTION 13—REFERENCE—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 13 and 66 (3).

Whether a debt is a bad debt and when it became bad are questions of fact to be determined in case of dispute not by the assessee but by the appropriate tribunal upon a consideration of all relevant and admissible evidence. But the decision of the Income Tax Officer on the question whether a debt is bad or irrecoverable operates only for the particular year under assessment and it would be open to the assessee to repeat his claim in respect of any particular debt in any subsequent year provided the debt has not been recovered in the interval.

Under the proviso to Section 13 of the Indian Income Act, the Income tax Officer is the sole arbiter on the question of the possibility of estimating the income, profits and gains of the assessee from the method of accounting employed by him.

Cases referred to:

COMMISSIONER OF INCOME TAX, C.P. AND BERAR *v.* SIR S. M. CHITNAVIS [1932] (28 N.L.R. 205; 137 Ind. Cas. 772; 1932 Comp. Cas. 464; 6 I.T.C. 453).

GOKULCHAND JAGANNATH *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1926] (94 Ind. Cas. 128; A.I.R. 1926 Lah. 446; 2 I.T.C. 180).

Petition under Section 66 (3) of the Indian Income Tax Act (XI of 1922), praying that the Commissioner of Income Tax, Punjab, Delhi and North West Frontier Provinces, Lahore, be required to state and refer the case for orders of the High Court.

Dharam Bhushan, for the assessee.

Asa Ram Aggarwal for *J. N. Aggarwal*, for the Commissioner.

JUDGMENT.—This is an application by a firm Rullia Mal-Raunak Ram of Mandi Dabwali, District Hissar, under sub-section (3) of Section 66 of the Income Tax Act against a refusal of the Commissioner to state a case on the ground that no question of law arises.

The questions which the Commissioner was asked to refer are recited in the order of the Commissioner rejecting the applicant's petition. The material facts appear from a discussion of the questions, which we deal with seriatim :—

(1) When the assessee had been calculating profits in past years according to the mercantile accountancy system, could the Income Tax Officer, with whom the Assistant Commissioner concurred, overrule the system and adopt one of his own?

It is admitted that the method of accounting adopted in this case is the mercantile accountancy system except in regard to certain transactions referred to in questions Nos. 3 and 4 which will be discussed below. It is conceded, therefore, that no question of law arises in this connection.

(2) Whether the Assistant Commissioner had any right to overrule the assessee's exercise of his right to write off a book debt as bad or irrecoverable at any time and to investigate or determine when in the Commissioner's opinion certain specified debts became bad or irrecoverable.

The question is concluded by the Privy Council ruling in *Commissioner of Income Tax, C.P. and Berar* v. *Sir S. M. Chitnavis.* In that case their Lordships held that an assessee has no option of declaring debts bad. "Whether a debt is a bad debt and when it becomes bad are questions of fact to be determined in case of dispute not by the assessee but by the appropriate tribunal upon a consideration of all relevant and admissible evidence". We have only to add that the decision of the Income Tax Commissioner on the question whether a debt is bad or irrecoverable operates only for the particular year under assessment and it would be open to the assessee to repeat his claim in respect of any particular debt in any subsequent year, provided the debt had not been recovered in the interval.

(3) Whether the Assistant Commissioner was justified in arriving at the decision that the assessee had made a profit of

Rs. 6,000 in *satta* business without any evidence or relying on hearsay and inadmissible evidence? and

(4) Whether the Assistant Commissioner was justified in disallowing Rs. 313 as losses paid to Sarsa Chamber on account of *satta* transaction?

The material facts as stated by the Commissioner in regard to these two questions, which can conveniently be considered together, are that the Income Tax Officer found as a fact that complete accounts had not been produced before him. In consequence he proceeded to estimate the income under the proviso to Section 13 of the Act. It has been held by a Division Bench of this Court cited as *Gokulchand Jagannath* v. *Commissioner of Income Tax, Punjab*, that under the proviso to Section 13, the Income Tax Officer is the sole arbiter on the question of the possibility of estimating the income, profits and gains of the assessee from the method of accounting employed by him. Thus no question of law arises in this reference.

In these circumstances, we hold that the Commissioner was right in refusing to state a case. We, therefore, dismiss this application with costs.

Application dismissed.

[IN THE LAHORE HIGH COURT.]

RAJA SINGH OBERA

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June 22, 1934.

REFERENCE—QUESTION OF LAW—SEPARATION OF MEMBERS OF JOINT FAMILY—WHETHER QUESTION OF LAW—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 66 (3).

Where an assessee alleged that he had separated from his son, but the Income Tax Officer, after holding an enquiry, decided that he had not separated and the Commissioner refused to refer to the High Court whether the assessee was separate from his son on the ground that the question was one of fact: Held, *on an application by the assessee under Section 66 (3) of the Income Tax Act, that the Income Tax*

Officer had power to make an enquiry and decide the question and, as the question was one of fact in this case, the Commissioner could not be required to refer the question to the High Court.

Cases referred to:

BISSESSWAR LAL BRIJ LAL *v.* COMMISSIONER OF INCOME TAX, BENGAL [1930] (I.L.R. 57 Cal. 1336; 34 C. W. N. 363; A. I. R. 1930 Cal. 449; 128 I. C. 327; 4 I. T. C. 365).

JATTU SHAH NATTU SHAH *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1932] (138 I. C. 187; 33 P. L. R. 947; A. I. R. 1932 Lah. 575; 6 I. T. C. 162).

Application under Section 66 (3) of the Income Tax Act, 1922, praying that the Commissioner of Income Tax, Punjab, may be required to state a case.

D. C. Ralli, for the assessee.

J. N. Aggarwal, for the Commissioner of Income Tax.

JUDGMENT.—An application was made to the Commissioner of Income Tax by the petitioner *Sardar* Raja Singh Obera to refer to this Court the question whether his son was separate from him. The Commissioner refused to do so on the ground that the question was *prima facie* a question of fact which had been decided by the Income Tax Officer on the evidence. He noted that when separation was alleged by the assessee before the Income Tax Officer that officer proceeded to make the necessary enquiry and when doing so recorded the statement of the assessee on the 28th of January, 1932. When this statement was read to the assessee he admitted making it but refused to sign it. His refusal to sign the statement was taken into account against the assessee and it was held that there had been in fact no separation. The petitioner has now applied to this Court to direct the Commissioner of Income Tax to state the case in accordance with law and refer it to this Court.

The matter is covered by authority. It was held by a Special Bench of the Calcutta High Court in *Bissesswar Lal Brij Lal* v. *Commissioner of Income Tax, Bengal*, that, where an application for registration of a firm was made by the members of a Hindu family and the Income Tax Officer in the absence of evidence, which he required the assessee

to produce, rejected the application, the Income Tax Officer had power to call for evidence as to the reality of the instrument and to refuse registration in the absence of evidence properly required. This decision was followed by a Bench of this Court in *Jattu Shah-Nattu Shah* v. *Commissioner of Income Tax, Punjab*. It is to the effect that, where the assessees, four brothers assessed hitherto as a Hindu undivided family, in submitting the return for a particular year applied for registration as a firm and the Income Tax Officer on enquiry under Section 25-A of the Income Tax Act held the family to be joint and refused registration, it was open to the Income Tax Officer to find against the declaration of division and to refuse registration holding that the joint family still existed.

In the case before us it is obvious that the question is one of fact and that it was properly decided by the income tax authorities. We, therefore, dismiss the petition with costs to the Commissioner of Income Tax.

Application dismissed.

[IN THE LAHORE HIGH COURT.]

NANNEH MAL JANKI DAS

v.

COMMISSIONER OF INCOME TAX.

Addison and Sale, JJ.

June 26, 1934.

INCOME TAX—BEST JUDGMENT ASSESSMENT—REFERENCE—SUFFICIENCY OF CAUSE FOR NON-COMPLIANCE WITH NOTICE—INCOME TAX ACT (XI OF 1922), SECTIONS 23 (4), 27 AND 66 (2).

The Commissioner of Income Tax is not bound to make a reference to the High Court in the matter of an assessment under Section 23 (4), where the assessment is not alleged to be arbitrary or mala fide *but the only question is whether there was sufficient cause which prevented the assessee from complying with the notices under Sections 22 (2) and 22 (4).*

The question whether there is sufficient cause for re-opening an assessment made under Section 23 (4) is essentially a question of fact and not one of law.

Cases referred to:

ABDUL BARI CHOUDHRY *v.* COMMISSIONER OF INCOME TAX, BURMA [1931] (I. L, R. 9 Rang. 281; 133 Ind. Cas. 81; A. I. R. 1931 Rang. 194).

COMMISSIONER OF INCOME TAX *v.* LAXMINARAIN BADRIDAS [1934] (1934 I. T. R. 246; 6 I.T.C. 301).

P. K. N. P. R. CHETTIYAR FIRM *v.* COMMISSIONER OF INCOME TAX, BURMA [1930] (I.L.R. 8 Rang. 203; 124 I.C. 267; 4 I.T.C. 340).

S. P. K. A. A. M. CHETTIYAR FIRM *v.* COMMISSIONER OF INCOME TAX [1930] (I.L.R. 7 Rang. 669; 121 I.C. 790; 4 I.T.C. 182).

Petition under Section 66 (3) of the Indian Income Tax Act XI of 1922, praying that a mandamus be issued to the Commissioner of Income Tax, Punjab, N. W. F., and Delhi Provinces, Lahore, directing him to state the case and to refer certain points of law for the decision of the High Court. [Petition No. 567 of 1932].

Kishen Dayal and Chiranjiva Lal, for the assessees.

Jagan Nath Aggarwal, for the Commissioner.

ORDER: This is an application for a mandamus to compel the Commissioner of Income-tax to state a case to this Court and to refer certain questions of law in connection with the assessment of the firm of Nanneh Mal Janki Das.

The facts are simple The assessee, who is a Hindu undivided family, was served with a notice under Section 22 (2) of the Act on the 14th May, 1931, calling upon him to make a return of his income within 30 days of the receipt of the notice. This was not complied with and five months later, namely, on the 7th October, 1931, the Income Tax Officer served another notice under Section 22 (4) of the Act asking the assessee to produce his accounts on the 10th October. This also was not done and an extension of time was applied for. The Income Tax Officer offered to give a week's time but the assessee refused to avail himself of this. The Income Tax Officer was not satisfied that the books were incomplete as alleged because they had never been shown to him. Ultimately

on the 22nd October, 1931, the Income Tax Officer proceeded under Section 23 (4) to make the assessment to the best of his ability. On receipt of the notice of demand the assessee applied under Section 27 of the Act for cancellation of the assessment, and the making of fresh assessment. He pleaded illness of the head of the family and also stated that there were disputes and suits between the members of the family and that owing to the appointment of a receiver in the suits the books could not be prepared. The Income Tax Officer went into these questions and rejected the application. The appeal to the Assistant Commissioner was dismissed. He disbelieved the plea of illness and held that the litigation did not constitute a sufficient cause as it had been going on for several years before. The assessee then applied to the Commissioner of Income Tax under Section 33 and Section 66 (2) of the Act. He rejected the petition under Section 33 and also refused to state a case as he held that the only question arising in the case was whether there was sufficient cause which prevented the assessee from complying with the notices under Sections 22 (2) and 22 (4) of the Act and that this question was one of fact which could not be referred to this Court.

It was contended before us on the strength of *S. P. K. A. A. M. Chettiar Firm* v. *Commissioner of Income Tax, Burma*, that it was a question of law for the High Court to decide whether the income tax authorities acted legally and rightly in making an assessment under Section 23 (4). This view, however, was dissented from by a Full Bench of the same Court in *Abdul Bari Chowdhry* v. *Commissioner of Income Tax, Burma.* It was said there that whether the assessment made by the Income Tax Officer under Section 23 (4) of the Act was valid or not was not a question of law that could be referred to the High Court. We are in agreement with this view and hold that the Commissioner of Income Tax was right in not referring the question as this is not a case where the Income Tax Officer made the assessment under Section 23 (4) *mala fide* and arbitrarily in the sense that he acted recklessly or fraudulently. In such case the High Court of Rangoon was of opinion that it might be able to order the Income Tax Officer to do his duty by virtue of its inherent prerogative powers. No attempt was made to argue

that the assessment in the present case was *mala fide* or arbitrary.

The only other point taken before us was that the question arising under Section 27 of the Act as to whether there was a sufficient cause for the re-opening of the assessment was one of law. In this connection *P.K.N.P.R. Chettiar Firm* v. *Commissioner of Income Tax, Burma*, was relied upon. This authority, though it was not directly before the Full Bench which decided *Abdul Bari Chowdhry* v. *Commissioner of Income Tax, Burma*, was not approved by it. Again in *Commissioner of Income Tax*, v. *Lakshminarain Badridas* it was held by the Judicial Commissioner, Nagpur, that on an assessment under Section 23 (4) of the Act after failure to submit a return no question of law arises for reference to the High Court. The decision of the Income Tax Officer that no sufficient cause for non-submission of a return was shown by the assessee, upon whom the onus lay, was a finding of fact. It is unnecessary to go into the other cases as we are of opinion that the question whether there was a sufficient cause for the re-opening of the assessment is essentially a question of fact.

For the reasons given we hold that there is no force in this petition which we dismiss with costs. Counsel's fee Rs. 75.

[IN THE LAHORE HIGH COURT.]

HARI CHAND *v.* EMPEROR.

Addison, J.

March 13, 1934.

INCOME TAX—OFFENCES—FALSE STATEMENT IN RETURN—RETURN FILED BEFORE RECEIVING NOTICE—CONVICTION UNDER SECTION 177, PENAL CODE—LEGALITY—INCOME TAX ACT (XI OF 1922), SECTION 22 (2)—PENAL CODE (ACT XLV OF 1860), SECTION 177.

Where a person concealed certain items of income in a return of income submitted by him and he was convicted under Section 177, Penal Code, but it appeared that he had not received any notice under Section 22 (2) of the Income Tax Act

requiring him to furnish a return: Held, *that, as he had not received any notice under Section 22 (2), he was not 'legally bound to furnish any information' within the meaning of Section 177, Penal Code, and the conviction was illegal.*

Application to revise an order of the Sessions Judge, Lyallpur, convicting the applicant under Section 177, Penal Code (C. R. P. No. 1583 of 1933).

Ram Lal Anand, for the petitioner.

S. A. Mahmud, for the Opposite Party.

ADDISON, J.—The petitioner has been convicted of an offence punishable under Section 177, Indian Penal Code, and sentenced to pay a fine of Rs. 25. This revision petition has been preferred against the conviction and sentence. The facts are simple. The Income Tax Officer went to Mandi Sangla on 28th May, 1930. There the petitioner met him with his books and put in a return in the prescribed form, and verified in the prescribed manner, setting forth his total income during the previous year. He, however, omitted to show certain rents realized from house property and he was prosecuted for an offence punishable under Section 177, Indian Penal Code. It has been found that he is technically guilty of this offence but that a small fine would be sufficient as not only he, but others were not showing the rent of certain houses which stood on land assessed to land revenue, as income. Nevertheless he should have shown the income and claimed that it was not assessable to income tax. If in other respects the conviction can be allowed to stand I would not interfere on this ground.

It is however contended that the conviction is illegal as the Income Tax Officer did not serve a notice upon him, requiring him to furnish within a period, not being less than thirty days, the necessary return. Section 22 (2), Income Tax Act, is mandatory and enacts that the Income Tax Officer shall serve such a notice upon him. In the present case it has not been proved that he was given this notice though the petitioner in his statement to the Court pleaded that he merely showed his accounts to the Income Tax Officer and then signed the return including the declaration at the foot thereof at the instance of the Income Tax Officer. It

must be held that the notice which it is enacted shall be served upon him and which gives him thirty days at least to furnish the return was not given to him. This being the case it was argued that it could not be held that he was legally bound to furnish information to the Income Tax Officer and that therefore there was no offence within the meaning of Section 177, Indian Penal Code, which runs as:

"Whoever, being legally bound to furnish information on any subject to any public servant as such furnishes as true information on the subject which he knows or has reason to believe to be false shall be punished...."

A case which has some analogy to the present case is ***Fatteh Ali*** v. *Queen-Empress* [1894] 15 P. R. 1894 Cr., decided by SIR MEREDITH PLOWDEN. There the District Magistrate received certain private information and commenced an inquiry under Section 202, Criminal Procedure Code, and in the course of that inquiry placed the persons examined by him on oath. At the trial the accused gave a different statement and was prosecuted for giving false evidence in that he made two contradictory statements. It was held that as Section 202, Criminal Procedure Code, only empowered a Magistrate, taking cognizance of an offence on complaint, to inquire into the case and as in the case before the District Magistrate there was no complaint, Section 202, Criminal Procedure Code, was not applicable. Thus, although the preliminary proceedings were no doubt taken by a Magistrate they were not magisterial proceedings taken in pursuance of any authority to administer an oath or compel his questions to be answered than a private individual.

In the case before me the petitioner was not legally bound to furnish the return though he did so and verified it. He would have been legally bound to furnish true information in the return had the Income Tax Officer first given him a legal notice under Section 22 (2), Income Tax Act. If after receiving this notice, which might have put the petitioner on his guard, the petitioner elected to fill in the return and verify it immediately after receiving the notice it would have been all right but this did not happen. In my judgment, though it has been proved that the petitioner furnished false information to a public servant he was not legally bound to furnish the information.

He could not therefore be convicted of an offence punishable under Section 177, Indian Penal Code. The petition must be accepted and the conviction and sentence set aside. The fine, if paid, will be refunded.

Petition allowed.

[IN THE LAHORE HIGH COURT.]

SHEIK ATA-UR-RAHMAN

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

July 5, 1934.

INCOME TAX—REFERENCE—REVISION BY COMMISSIONER—ORDER MADE BEFORE AMENDING ACT OF 1933—RIGHT TO CLAIM REFERENCE—AMENDING ACT NOT RETROSPECTIVE—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 33 and 66 (3)—INDIAN INCOME TAX (AMENDMENT) ACT (XVIII of 1933).

The provision in the Income Tax (Amendment) Act, 1933, which extends the right of an assessee to claim a reference, to orders made in the exercise of the Commissioner's powers of revision under Section 33, has no retrospective effect as it does not relate to a mere matter of procedure, and an assessee is not therefore entitled to apply to the High Court under Section 66 (3) to require the Commissioner to state a case in respect of matters arising out of an order under Section 33 made before the date on which the amending Act came into force.

Cases referred to:

ATHLUMNEY *In re*, [1898] (2 Q. B. 551).

COLONIAL SUGAR REFINING CO. *v.* IRVING [1905] (1905 A. C. 369).

DELHI CLOTH AND GENERAL MILLS CO. LTD. *v.* COMMISSIONER OF INCOME TAX [1927] (I. L. R. 9 Lah. 284; 106 Ind. Cas. 156; 54 I. A. 421; 32 C. W. N. 237; 30 Bom. L. R. 60; 32 C. W. N. 237; 53 M. L. J. 819; A. I. R. 1927 P. C. 242).

KHONDKAR MUHAMMED SALEH *v.* CHANDRA KUMAR MUKERJEE [1930] (I. L. R. 56 Cal. 1117; 122 Ind. Cas. 201; 33 C. W. N. 519; A. I. R. 1930 Cal. 34).

SALEM TOWN BANK LTD. *v.* VARADAPPA CHETTI [1911] (12 Ind. Cas. 553; 1911, 2 M. W. N. 386).

Petition under Section 66 (3), Indian Income Tax Act (XI of 1922), praying that the Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, Lahore, be required to state the case and make a reference to the High Court [No. 192 of 1934].

Kishen Dayal, for the assessee.

J. N. Aggarwal, for the Commissioner.

ORDER.—In connection with the assessment of the petitioner, Sheikh Ata-ur-Rahman, to income tax for 1932-33, a question arose as to the effect of a certain deed of *wakf* executed by the petitioner. The Income Tax Officer held the deed to be invalid. The Assistant Commissioner on appeal held the deed to be valid and allowed a certain refund. By order, dated the 1st of September, 1933, the Commissioner reviewed the Assistant Commissioner's order and restored the assessment made by the Income Tax Officer.

Against this order, the petitioner applied under Section 66 (2) of the Income Tax Act for reference to this Court on two alleged points of law relating to the *wakf* deed in question and its effect on the assessment of income-tax. The Commissioner rejected the application on the ground that as Section 66 of the Income Tax Act stood on the 1st September, 1933 (the date of the Commissioner's order under Section 33), there was no provision for an application to the High Court from an order under Section 33. The Commissioner pointed out that the right to claim such a reference to this Court was extended to assess only on 11th September, 1933, when the Income Tax Amendment Act of 1933 was passed. He held that the amendment could not be interpreted so as to give the petitioner a right of reference against an order which was not referable at the time when it was passed. He accordingly rejected the application and the petitioner has now applied to this Court under Section 66, asking that the Commissioner may be required to state a case.

The sole point for our consideration is whether the Income Tax Amendment Act of 1933 which extended to an assessee, a right to claim a reference against an order under Section 33 with effect from the 11th September, 1933, should be interpreted retrospectively so as to permit a reference in case of such an order passed on the 1st September, 1933. For the petitioner Mr. Kishen Dayal urges that the right conferred by the Amending Act of 1933 relates to a question of procedure only, that alteration in procedure is always retrospective and that since the application was made within the sixty days limit provided by sub-section 2 of Section 66, his right to claim a reference under Section 66 should be conceded. No authority applicable to the circumstances of the present case has been brought to our notice. But Mr. Kishen Dayal has cited *Khondkar Muhammad Saleh* v. *Chandra Kumar Mukerjee* and *Salem Town Bank Ltd.* v. *Varaduppa Chetti.* He has also referred us to MAXWELL on the *Interpretation of Statutes*, 7th Edition, pages 195 and 196.

We consider that there might have been force in Mr. Kishan Dayal's argument if the amendment in question had been a mere matter of procedure. We agree with the observations in *Khondkar Muhammad Saleh* v. *Chandra Kumar Mukherjee* that it is a settled principle that there is no vested right in procedure and that alterations in procedure should be interpreted retrospectively but it is important to note that both the rulings cited by Mr. Kishan Dayal relate solely to retrospective interpretation in matters of procedure. In the present case, the amendment introduced is not a mere matter of procedure. On the 1st of September, 1933, the Commissioner of Income Tax passed an order which so far as Section 66 of the Income Tax Act was concerned, was final. Eleven days later, an amendment of Section 66 was made which gave the assessee a right to re-open such an order on a referrence to the High Court. In other words, the assessee is given what is in effect a right of appeal against the Income Tax Commissioner's order. A right of appeal is not a mere matter of procedure. It is a vested right created by statute. The ordinary rule of interpretation of a statute is that no statute shall be construed to have a retrospective operation unless such

a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication (see MAXWELL, page 186).

As observed by WRIGHT, J., in *In re Athlumney* 2 Q.B. (1898) pages 551-552 "no rule of construction is more firmly established than this that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards a matter of procedure."

In *Delhi Cloth and General Mills Co., Ltd.* v. *Commissioner of Income Tax, Punjab*, which dealt with the right of appeal to the Privy Council from a decision of this Court upon a case stated under Section 66 of the Income Tax Act, the question arose as to whether under Section 66 any appeal lay from an order of the High Court made before the 1st of April, 1926, when an amendment in the Income Tax Act allowing an appeal to His Majesty in Council came into force. Their Lordships of the Privy Council observed in this connection as follows (page 290):— "The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in *Colonial Sugar Refining Co.* v. *Irving* (1935 A. C. 369), where it is in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their Lordships can have no doubt that provisions, which if applied retrospectively, would deprive of their existing finality, orders which, when the statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to apply to orders final at the date when it came into force, it must be clearly so provided. Their Lordships cannot find in the section even an indication to that effect."

In the present case the order which the Commissioner of Income Tax passed on the 1st of September, 1933, was final as Section 66 then stood. There is no suggestion in the amending Act that the amendment was to be applied retrospectively to an order which had already attained finality. Following the reasoning of their Lordships of the Privy Council in the passage

already quoted from *Delhi Cloth and General Mills Co., Ltd.* v. *Commissioner of Income Tax*, we hold that the amendment gave no retrospective right to the petitioner to claim a reference in this case. We, therefore, uphold the decision of the Commissioner and reject the application with costs.

Application rejected.

[IN THE HIGH COURT OF LAHORE.]

JEWAN SHAH MAYA SHAH

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Beckett, JJ.

July 16, 1934.

INCOME TAX—ACCOUNTS NOT PROPERLY KEPT—SUMMARY ASSESSMENT—INCOME TAX OFFICER'S DECISION—FINALITY OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 13.

When the assessing officer has reason to believe that the accounts of the assessee are unreliable he is at liberty to adopt his own method of assessment, and the question whether he was entitled to reject the accounts as unreliable or not is expressly reserved to the assessing officer under Section 13 of the Income Tax Act.

Petition under Rule 12 of the Rules framed by the High Court regarding application under Section 66 (3), Income Tax Act, for discharging an order made by JAI LAL and MONROE, JJ., directing the Commissioner of Income Tax to state certain points of law. [Petition No. 8 of 1933.]

J. N. Aggarwal, for the Commissioner.

S. N. Bali, for the assessees.

ORDER :—Messrs. Jiwan Shah and Maya Shah were required to make a declaration of income for the purpose of assessing the amount of income tax due from them for the year 1931-32. In order to verify the declaration, the books of the firm were examined. The Income Tax Officer came to the conclusion that the books had not been properly kept and were valueless

for purposes of assessment. He accordingly proceeded to assess the income on the basis of such consideration as appeared to him to afford an indication of what the real income under assessment had been. Among other items, it included a sum of Rs. 1,350 which would have been due by way of interest on a mortgage executed in favour of the assessees, although payment of interest was not shown in the books produced before him. There was an appeal to the Assistant Commissioner of Income Tax which was rejected. An application was then made to the Commissioner of Income Tax for reference to the High Court. This was also rejected.

Messrs. Jiwan Shah Maya Shah then came to this Court with a petition asking that the Commissioner of Income Tax should be directed to refer certain alleged points of law for decision. The application was accepted only with regard to one of these points and the question which the Commissioner was directed to refer was stated as follows :—

"Whether the Assistant Commissioner and the Income Tax Officer were justified in treating the sum of Rs. 1,350 as income in this case ?"

The finding of the assessing officer has already been given. He included the amount due by way of interest on the mortgage merely because the books have been found to be false and he could not, therefore, be certain whether this sum had been received or not. In refusing to refer the case, the Commissioner supported this finding on two grounds; first, because the Income Tax Officer was entitled to assess the amount due on the assumption that it had been received, in view of his finding that the method of accounting was unreliable; and secondly, on the ground that interest due on a mortgage could in any case be treated as income, whether it had actually been collected or not. It is obvious that the second question would only arise, if the former reason refusing to refer the matter was not correct. In our opinion, the question referred must be answered in the affirmative. When the assessing officer has reason to believe that the accounts are unreliable, he is at liberty to adopt his own method of assessment. What counsel for the petitioners wants us to do is to decide whether the Income Tax Officer was entitled to reject the accounts as unreliable or not. This is a question

which is expressly reserved to the assessing officer, under Section 13 of the Indian Income Tax Act. This disposes of the reference. We allow the Income Tax Commissioner his costs.

[IN THE PRIVY COUNCIL.]

MAHARAJADHIRAJ OF DARBHANGA
v.
COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA.

Lord Tomlin, Lord Macmillan and Sir John Wallis.

June 19, 1934.

INCOME TAX—SUCCESSION—DEATH OF ASSESSEE BEFORE FILING OF RETURN—SUCCESSOR'S LIABILITY TO BE ASSESSED—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 26 (2), SCOPE OF —' ASSESSMENT ', MEANING OF.

The late Maharaja of Dharbanga died on July 3, 1929. At the date of his death the Maharaja had been served with a notice under Section 22 (2) of the Income Tax Act to furnish a return of his income for the year 1927-28 and no return had been made, though the time for furnishing that return had not expired. The Commissioner held that the Maharaja's son was taxable in respect of this income under Section 26 (2) of the Act as he had succeeded to the business of his father, and the High Court of Patna upheld this decision. On appeal to the Privy Council: Held, *that the case fell within Section 26 (2) of the Income Tax Act and the appellant was rightly assessed as he had succeeded to the business that was being carried on by his father and had carried it on himself, after his father's death.*

The word ' assessment ' in Section 26 (2) is not confined to the definite act of making an order of assessment and where a notice has been given under Section 22 (2) to a person to furnish within the time specified a return in the prescribed form, the process of assessment has begun and continues until some order of assessment is made. The words, ' at the time of making an assessment ' in Section 26 (2) mean ' in the course of the process of assessment ', and in the present case it was therefore open to the Income Tax Officer to assess the appellant under Section 26 (2). Held also, *that Section 26 (2) was not confined in its application to cases of succession* inter vivos.

Cases referred to:

RAJENDRANATH MUKERJEE *v.* COMMISSIONER OF INCOME TAX [1934] (1934 I. T. R. 71; I. L. R. 61 Cal. 285.)

Sir Dawson Miller, *K. C.*, and *Messrs. A. M. Latter*, *K. C.*, *K. P. Jayaswal* and *R. P. Hills*, for the appellant.

A. M. Dunne, *K. C.*, and *W. Wallach*, for the respondents.

LORD TOMLIN.—This is an appeal from a judgment of the High Court of Judicature at Patna delivered on a question of law referred under Section 66 (2) of the Indian Income Tax Act, 1922, by the Commissioner of Income Tax, Bihar and Orissa.

The question referred was answered by the Court adversely to the appellant, the subject, and the appeal to His Majesty in Council followed.

The point arises in this way. The late Maharajadhiraj died on July 3, 1929. At the date of his death the Maharajadhiraj had been served with a notice under Section 22 (2) of the Income Tax Act to furnish a return of his income in the prescribed form. At the date of his death the time for furnishing that return had not expired and no return had been made. The return required was for the year, April 1, 1929, to March 31, 1930, but that return should have been based upon the income of the previous year, that is to say, in this particular case, the income for the year commencing October 1, 1927, and ending September 30, 1928, that being the *fasli* year which governed the making up of accounts of the Maharajadhiraja's estate.

Now it seems to be accepted, at any rate for the purpose of this case it must be accepted, that in the ordinary way a deceased person's estate cannot be fixed with tax in respect of a period for which no return has been made and in respect of which there has been no default in making a return nor can a representative of such person be fixed with tax in respect of the profits of that period received by the deceased person. That position seems to have been accepted; but the Commissioner of Income Tax held that inasmuch as the Maharajadhiraj was carrying on a number of businesses to which his son, the present appellant, succeeded, the present appellant was taxable under Section 26 (2) of the Act added by amendment by Act III of 1928. This decision of the Commissioner was affirmed by the High Court

upon the question referred to them and is now called in question here by the appellant.

The sub-section in question provides that:—

"Where at the time of making an assessment under Section 33, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

Now the appellant urges that the section is not applicable for two reasons: First of all, he says that although the Commissioner of Income Tax has found as a fact that the business to which the appellant succeeded was being carried on by the appellant, that finding of fact can be gone behind because the Commissioner of Income Tax mis-directed himself in point of law and therefore, that there was not here a succession "in such capacity"—that is, a succession by a person carrying on the business. The moment you so find the finding of the Commissioner of Income Tax that the business was being carried on ought, it is maintained, to be displaced.

The way in which it is put is this: The Maharajadhiraj carried on apparently a number of businesses, including that of a mill-owner, but his main business appears to have been the business of money-lending. The onus, says the appellant, is on the Crown to show under the sub-section that not only did the appellant succeed to the business, but that he carried it on. It is true that the Commissioner of Income Tax found that he did carry it on, but he mis-directed himself, it is suggested in point of law. The Commissioner said this:

"The second question of fact upon which I have to find is whether as contended by the assessee, the business in money-lending was discontinued at the death of the late Maharajadhiraja. At that date loans out at interest amounted to some two crores of rupees. No evidence has been put in to show that any attempt has since been made to call in or realise any parcel of this amount. It is simply represented that no fresh loans have been given out. But to give out no fresh loans would not

amount to closing the business. Moreover, the contention that the business had been closed on the death of the late Maharajadhiraja was not made at the time during the assessment proceedings, which were not completed until March 27, 1930, while the decease of the late Maharajadhiraja occurred on July 3, 1929, but the contention was first put forward in the appeal petition dated April 28, 1930. From this fact it appears to me plain that the contention was an afterthought."

It is suggested that in that language the Commissioner of Income Tax has mis-directed himself in regard to onus by treating the appellant as having to discharge the onus of proving that he discontinued the business, and by treating the non-calling in of outstanding loans as necessarily in law conclusive that the business was being continued. Their Lordships do not think that is a fair inference to be drawn from the language. The Commissioner of Income Tax is weighing the factors which in his opinion are relevant to be considered for the purpose of determining the question whether or not the business was being carried on, and he is not saying that the appellant must show it was discontinued or that the fact of the loans not having been called in is conclusive that the business was being carried on. That being so, it seems to their Lordships that the point of misdirection fails and that the matter must be considered on the footing that there was a business being carried on by the late Maharajadhiraj, that the appellant succeeded to it, and that having succeeded to it he carried it on.

Now the second point that is made is this: Assuming those three things nevertheless, the sub-section does not apply because the opening words: "Where, at the time of making an assessment under Section 23, it is found that the person carrying on any business, profession or vocation has been succeeded" must apply only to those cases where it was possible under Section 23 to assess the predecessor. That seems to their Lordships to put upon the word "assessment" the narrow meaning which was deprecated by their Lordships in the case of *Rajendra Nath Mukerjee* v. *Commissioner of Income Tax*. In that case in the judgment of the Board delivered by Lord MACMILLAN, this was said:

"That the word 'assessment' is not confined in the statute to the definite act of making an order of assessment appears from Section 66, which refers to 'the course of any assessment.'"

On that view of "assessment" it seems to their Lordships that where a notice has been given under Section 22 (2) to a person to furnish within the time specified a return in the prescribed form the process of assessment has begun and continues until some order of assessment is made. If that be so, the words "at the time of making the assessment" mean in the course of the process of assessment and inasmuch as in the present case a notice was duly served on the late Maharajadhiraj the process of assessment had begun and it would be impossible to say that the event had not occurred which enabled the tax officer to find, if the facts justified the finding, that the person on whom this notice had been served had carried on a business and had been succeeded in such capacity by another person.

It was also suggested that inasmuch as you could not tax a deceased person who had not made a return or was not in default in making a return, the sub-section ought to be confined to cases of a succession to somebody who was himself liable to tax and that that would lead to construing the section as applying only to cases of succession *inter vivos*.

Their Lordships are of opinion that approaching in either of those ways it is not possible to read the sub-section as the appellant desires and that this case falls within the language of the sub-section. The assessment was thus properly made.

Their Lordships will accordingly humbly advise his Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors.—Messrs. Hy. S.L. Polak & Co., for the Appellants. *The Solicitor, India Office,* for the Respondents.

[In The Lahore High Court.]

NAWAL KISHORE KHARAITI LAL

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June 26, 1934.

Income Tax—Non-resident—Notice on Agent for Making Return Before Declaring Him Agent—Validity—Declaration as Agent More Than one Year After Expiry of Assessment year—Legality of Assessment—Indian Income Tax Act (XI of 1922), Sections 22 (2), 34 and 43.

The assessee had dealings with a banker of Jaipur. Notice was issued to the assessee on February 2, 1928, under Section 43 of the Income Tax Act to show cause why he should not be treated as agent of the non-resident banker. On February 13, 1928, a notice was served on the assessee under Section 22 (2) after hearing him. An appeal by the assessee was however, dismissed as premature on the ground that no order had been made against him under Section 43. On May 8, 1931, a formal order declaring the assessee an agent was passed and assessment was levied without serving a fresh notice on the assessee under Section 22 (2). On a reference by the Commissioner : Held, *that the decision that no order had been passed against the assessee on February 13, 1928, was binding on the income tax authorities and in view of this decision the notice issued on February 13 was invalid since it was issued before May 8, 1931, when the assessee was declared agent.* Held further, *that as no assessment could be made without issuing a fresh notice under Section 22 (2) after May 8, 1931, and as such a notice was time-barred under Section 34, the assessee was not liable to be taxed.*

The facts of the case appear in the reference made by the Commissioner which runs as follows :—

The facts of this case are that Messrs. Nawal Kishore Kharaiti Lal are a firm of jewellers in Delhi, who have been treated under Section 43 of the Income Tax Act as agent of the non-resident firm of Seth Banji Lal, Bankers of Jaipur, and assessed to income-tax for the year 1926-27 on an income of

Rs. 72,928 under Section 23 (3), read with Section 34 of the Income Tax Act under the following circumstances.

2. Seth Banji Lal is described as a Hindu undivided family carrying on business as bankers in the Jaipur State outside British India. The banking business includes loans made to certain firms in Delhi from which income from interest is derived. The petitioner, being one of the firms with whom money is invested, pays interest thereon to the non-resident. As it appeared to the Income Tax Officer, Delhi, that the petitioner had business connection with the non-resident and that the latter was in receipt of income through him, he caused a notice to be served on the petitioner on 2-2-1928 under the proviso to Section 43, requiring him to attend his office on 9-2-1928 and show cause why he should not be treated as agent of Seth Banji Lal of Jaipur for income tax assessment purposes. Mr. Chatar Behari Lal, Advocate of Delhi, appeared on 9-2-1928 on behalf of the petitioner and at his request the case was adjourned to 13-2-1928. The Income Tax Officer after hearing counsel on the latter date obviously decided to treat the petitioner as the agent of the non-resident and served a notice under Section 22 (2) read with Section 34 on the same date, requiring the petitioner to file a return of income for the assessment year 1926-27 as agent of Seth Banji Lal of Jaipur. A return for the year ending 31-3-1926 was submitted to the Income Tax Officer on 12-3-1928, but no income was shown therein. A note was added to the return saying that it was filed under protest as the petitioner could not be treated as agent of Seth Banji Lal under the Act. After this the case seems to have been held up as a reference was pending before the High Court on a somewhat similar point connected with the assessments of 1924-25 and 1925-26. That reference was decided on 14-5-1932. The Income Tax Officer before continuing the proceedings for assessment for the year 1926-27, which as a matter of fact need not have been interrupted, caused another notice to be served on the petitioner on 5-5-1931 under Section 43 in connection with the assessment of 1926-27, informing him that he proposed to treat him as agent of Seth Banji Lal for the year 1926-27 and informing him that if he had any objection, the Income Tax Officer would be glad to hear the same on 8-5-1931. After hearing the

petitioner the Income Tax Officer passed an order holding him to be the agent of the non-resident firm. On the 5th of May, 1931, the petitioner submitted a revised return in which he showed an income of Rs. 51,549-15-6, which he noted was the amount credited in the petitioner's books to the account of Seth Banji Lal of Jaipur. This revised return was also filed under protest and the petitioner further noted that he could not be recognised as agent of Seth Banji Lal of Jaipur under the Act. The circumstances under which this revised notice was filed are not apparent from the record, but since no assessment had been made after the receipt of the first return on 12-3-1928, the petitioner had the right under Section 22 (3) to furnish a revised return at any time before the assessment was made. After the receipt of the revised return, the assessment was made under Section 23 (3) on an income of Rs. 72,928 which was ascertained to be the sum paid to the non-resident in the assessment year in question. An appeal was brought against the assessment but was unsuccessful.

3. The petitioner now asks that certain points of law arising out of the order under Section 31 may be referred to the High Court for decision.

I have heard Mr. Chatar Behari Lal, Senior Advocate, Delhi, who appeared on behalf of the petitioner and after discussion with him it has been agreed that the following points of law should be referred to the High Court, *viz.*, :—

(1) "Whether in the circumstances of this case, the petitioner could be held to be an agent for Seth Banji Lal within the meaning of Section 43 ?"

(2) "Whether the assessment made on the firm of Nawal Kishore Kharaiti Lal of Delhi (the petitioner) as agent of Seth Banji Lal of Jaipur under Section 43 is rendered illegal by the fact that the notice which the Income Tax Officer served on the firm under the proviso to Section 43 did not mention any particular year for which the Income Tax Officer proposed to treat the firm as an agent ?"

(3) "Whether proceedings could be started under Section 34 of the Act against the petitioner as agent of the non-resident in view of the fact that action under that section was

time-barred, more than one year having lapsed since the issue of the notice dated 2-2-1928 ?"

4. In regard to the first point, counsel for the petitioner argues that Seth Banji Lal belonged to a Hindu undivided family, but as he died in December, 1928, the petitioner firm could not have been treated as agent after his death. The argument that Seth Banji Lal died in December, 1928, and that the petitioner firm could not have been declared agent after his death is based on the assumption that there was no decision to treat the petitioner as agent prior to the Income Tax Officer's order dated 8-5-1931. The learned counsel loses sight of the fact that a former Income Tax Officer had decided to treat the petitioner as agent as far back as 13-2-1928, when he issued notices under Section 22 (2) read with Section 34. Section 43 merely requires the Income Tax Officer to serve a notice of his intention to treat a person in receipt of income on behalf of a non-resident as agent and after hearing any objection against such intention, the law prescribes that such person shall be deemed to be such agent. No order to this effect is actually required. The provisions of the section have been amply fulfilled. The fact that a succeeding Income Tax Officer caused another such notice to issue under Section 43 subsequently and then passed an order treating the person as an agent does not affect the position, nor are the former proceedings vitiated by such subsequent action. It is clear that the non-resident was in receipt of income through the petitioner. The decision of the Privy Council in the case of *Commissioner of Income Tax, Bombay* v. *The Bombay Trust Corporation Ltd.*(4 I. T. C. 312) applies to this case. In the circumstances I consider that the reply to the question should be returned in the affirmative.

As regards the second point, the law does not require the Income Tax Officer to specify the period for which it is his intention to treat a person as an agent of a non-resident. Inasmuch as the petitioner actually did submit a return for the year ending 31-3-1926 under Section 22 (2) read with Section 34 on 12-3-1928 and subsequently put in a revised return for the same period, it is clear that he was aware of the year for which the assessment had to be made. In view of the decision of the Lahore High Court in the petitioner's own case in

connection with the assessment for 1924-25, the reply should be in the negative.

Finally, as regards the third question, it will be observed that the first notice under Section 43, calling upon the petitioner to show cause why he should not be treated as agent for the non-resident, was admittedly issued on 2-2-1928, and served upon the petitioner. After hearing the petitioner as required by the proviso to Section 43, a notice under Section 22 (2) read with Section 34 was served on 13-3-1928. A notice under Section 34 could have been issued at any time within one year from the end of the year 1926-27, *i.e.*, up to the 31st March, 1928. That notice was, therefore, quite within the time prescribed and a return was actually submitted in compliance with it on 12-3-1928. Now, all that the section requires the Income Tax Officer to do is to commence proceedings for assessment within the time limit prescribed by it. It is not necessary that proceedings should be completed within that period. See in this connection the decision of the High Court of Burma in the case of *Commissioner of Income Tax* v. *Mr. A. N. Burjorjee*. The fact that a subsequent notice was issued does not conceal the former proceedings which were pending under Section 34. Had the proceedings been concluded immediately after the receipt of the first return on 12-3-1928, in which no income was shown, the petitioner might have been penalised under Section 28 in view of the information in the possession of the Income Tax Officer that he was in receipt of income on behalf of the non-resident. The delay in making the assessment, whatever the cause, really reacted in favour of the petitioner, who being aware that the former assessment proceedings were still pending filed a revised return on 5-5-1931 in which he declared an income of Rs. 51,549 as having been credited by him to the account of the non-resident. I would, in view of what is said above, answer the third question in the affirmative.

5. I should add that similar points have been raised against the assessments similarly made for the years 1927-28 and 1928-29, but as the questions raised are common to all the three years, the petitioner's counsel has agreed to abide the result of

the reference now being made to the High Court for the year 1926-27.'

Kishen Dayal and *Bishen Narain*, for the assessees.

J. N. Aggarwal and *Asa Ram Aggarwal*, for the Crown.

JUDGMENT.—Messrs. Nawal Kishore-Kharaiti Lal, jewellers of Delhi, have been treated under Section 43 of the Income-tax Act as agent of the non-resident firm of Seth Banji Lal, Bankers of Jaipur, and assessed to income tax for the year 1926-27 on an income of Rs. 72,928 under Section 23 (3) read with Section 34 of the Income Tax Act.

As a result of this assessment the Commissioner of Income Tax has been moved by the assessee to refer to us the following three points of law:—

(1) Whether, in the circumstances of this case, the petitioner could be held to be an agent for Seth Banji Lal within the meaning of Section 43 ?

(2) Whether the assessment made on the firm of Nawal Kishore-Kharaiti Lal of Delhi as agent of Seth Banji Lal under Section 43 is rendered illegal by the fact that the notice which the Income Tax Officer served on the firm under the proviso to Section 43 did not mention any particular year for which the Income Tax Officer proposed to treat the firm as an agency ? and

(3) Whether proceedings could be started under Section 34 of the Act against the petitioner as agent of the non-resident person in view of the fact that action under that section was time-barred, more than one year having elapsed since the issue of the notice dated the 2nd February, 1928 ?

The material facts leading up to this assessment are that, on the 2nd February, 1928, the Income Tax Officer caused a notice to be served on the petitioner Messrs. Nawal Kishore-Kharaiti Lal under the proviso to Section 43 requiring him to attend and show cause why he should not be treated as agent of Seth Banji Lal of Jaipur for income tax assessment purposes. The petitioner duly attended and, on the 13th February, 1928, the Income Tax Officer passed the following order :—

"Heard. Notice to be served. Notice to issue under Section 22 (2) of the Income Tax Act with necessary forms."

As stated by the Commissioner of Income Tax in his reference, this order was obviously a decision by the income tax authorities to treat the petitioner as the agent of Seth Banji Lal. The Commissioner has, however omitted to mention the fact that an appeal was preferred against this order to the Assistant Commissioner, who, on the 2nd May, 1928, rejected the appeal, on the ground that no order had been passed holding the petitioner to be the agent of the non-resident, Seth Banji Lal of Jaipur. He accordingly held that the appeal was incompetent as there was nothing to appeal against. This order by the Assistant Commissioner must be regarded as a decision binding on the income tax authorities, that up to 2nd May, 1928, no order had been passed declaring the petitioner to be the agent of a non-resident person under Section 43 of the Income Tax Act.

That this was the view then taken by the income tax authorities is indicated by the fact that, on 5th May, 1931, (after an interval during which it appears that proceedings were delayed by a reference to the High Court on a point not now material to the issue) another notice was issued under Section 43 for the same year namely, 1926-27, and an order was actually passed on 8th May, 1931, wherein the Income Tax Officer definitely held that the petitioner was the agent under Section 43 of the non-resident Seth Banji Lal. The Income Tax Officer did not however issue any fresh notice under Section 22 (2) of the Income Tax Act but proceeded to make an assessment on the basis of the previous notice under Section 22 (2) which had been issued on 13th March, 1928.

Holding as we do that no order was passed by the income tax authorities under Section 43 until 8th May, 1931, we find that the notice which was issued under Section 22 (2) on 13th February, 1928, was invalid, since the issue of a notice to the petitioner as an agent was not competent until an order had been passed declaring him under Section 43 to be the agent of a non-resident person. The answer, therefore, to the first question referred to us by the Commissioner is that the petitioner could not be held in 1926 to be the agent of Seth Banji Lal for the purposes of assessment of 1926-27 since no order by the income tax authorities treating him as such agent was passed until 8th May, 1931.

Passing now to the third question under reference, it is clear that, since the order to treat the petitioner as an agent was not passed till 8th May, 1931, a fresh notice should have issued under Section 22 (2) requiring the assessee to furnish the return of income in his capacity as such agent. Under Section 34 of the Income Tax Act proceedings to assess or reassess income which had hitherto escaped assessment, must be commenced at any time within one year of the end of the year under assessment. In this particular case since the petitioner was not declared the agent of the non-resident person till the 8th May, 1931, any proceedings taken after the date of this declaration would be time-barred for the purposes of assessment of income tax for the year under reference, *viz.*, 1926-27. No doubt, it was for this reason that, after declaring the petitioner an agent by his order dated 8th May, 1931, the Income Tax Officer did not issue any fresh notice under Section 22 (2) but endeavoured to evade the provisions of Section 34 by relying on the notice issued by his predecessor on 13th February, 1928.

Our answer, therefore, to the third question referred to us is that the assessment proceedings actually taken against the petitioner under Section 34 on 18th May, 1931, for the year 1926-27 were time-barred.

In view of our answers to questions Nos. 1 and 3 question No. 2 does not arise.

The result of this reference is that the petitioner will escape assessment of income tax for the year 1926-27 on a technicality. We make no order as to costs.

[IN THE LAHORE HIGH COURT.]

LAL MOHAMMED SARDAR MOHAMMAD

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June 21, 1934.

INCOME TAX—RETURN—OMISSION TO STATE PERIOD OF INCOME—OMISSION TO COMPLY WITH NOTE 5 (*a*)—VALIDITY OF RETURN—BEST JUDGMENT ASSESSMENT—INCOME TAX ACT (XI OF 1922), SECTION 23 (4).

Where, in a return submitted by the assessee in pursuance of a notice issued under Section 22 of the Income Tax Act the income was stated to be " about Rs............" in Columns 2 and 3 and in the total, the period to which the income declared related was not stated, and the requirement of Note 5 (a) *(that if the accounts are kept on the mercantile accountancy system, the return must be made in the form prescribed therein) was not complied with, and the Income Tax Officer made an assessment under Section 23 (4) treating the return as no return*: Held, *that the return was an invalid return and the Income Tax Officer was justified in making an assessment under Section 23 (4).*

COMMISSIONER OF INCOME TAX *v.* A. R. A. N. CHETTIAR FIRM [1928] (6 Rang. 21; 11 I. C. 29; A. I. R. 1928 Rang 108) followed.

Case referred under Section 66 (2) of the Income Tax Act, XI of 1922 by Rai Bahadur Mangat Rai, Commissioner of Income Tax, Punjab and N. W. F. P. [No. 22 of 1933].

Statement of the case made by the Commissioner was as follows :—

" By an application under Section 66 (2) of the Income Tax Act I have been asked to draw up a statement of the case and refer it to the High Court on six questions enumerated in the application and alleged to be questions of law arising out of the assessment of the case. By a separate order under Section 66 (2) I have declined to make a reference to the High Court, except on question (*a*) which has been framed by the assessee as under :—

" Whether the return furnished by the petitioner was an invalid return ? "

This reference relates to the assessment for 1931-32, made on an "association of individuals" (henceforth called the assessee) who carry on business as hide merchants with their head office at Jullundur in British India, and a branch business at Basti Nau in the Kapurthala State outside British India. For purposes of an assessment for the year 1931-32, the Income Tax Officer issued a notice under Section 22 (2) of the Income-tax Act requiring the assessee to furnish a return in the prescribed form and verified in the prescribed manner, setting forth his total income during the "previous year." The notice was accompanied by a printed form of return as prescribed under Rule 19 of the Income Tax Rules, 1922 (Page 83 of the Income Tax Manual, 5th Ed.). The assessee sent back the form of return to the Income Tax Officer with the entries 'about 800' and 'about 110' in columns 2 and 3 respectively against head 5 "business, trade, commerce, manufacture, etc." These figures were again qualified by the word "about" when entered in the column for 'total.' The return did not show the period to which the income declared related, the space provided for the purpose in the form of verification having been left blank. Again Note 5 (*a*) attached to the return requires that where the accounts are kept on the mercantile accountancy system, the return must be filed in the form prescribed thereunder. The system of accountancy adopted by the assessee was mercantile and he should have filled in the form under Note 5 (*a*) of the return. This was however not done. In these circumstances the Income Tax Officer treated the return as invalid and held that the notice under Section 22 (2) was not complied with. There was a further default in respect of a notice under Section 22 (4) with which, however, this reference is not concerned. The Income Tax Officer proceeded to make the assessment under Section 23 (4) of the Act. The assessment was followed by an application under Section 27 in which it was contended that the omission of the year of accounting in the verification form and of a statement contemplated by Note 5 (*a*) were not such as could invalidate the return. No explanation was however, offered for the qualification affixed to the figure of income entered in the return. The Income Tax Officer refused to reopen the assessment, *vide* his order under Section 27, attached as

Appendix A. Thereupon an appeal was filed before the Assistant Commissioner who supported the Income Tax Officer and rejected the appeal, *vide* his order under Section 31 (copy attached as Appendix B). I have now been asked to state a case on the question reproduced above.

Under Section 22 (2) of the Act, the assessee was required (1) to furnish a return in the prescribed form, (2) to verify it in the prescribed manner, (3) to set forth his total income during the previous year. The entry of a figure rendered vague by the qualifying word 'about', the omission of the year of account from the verification and the lack of the details setting forth the income under Note 5 (a) cannot be said to be a negligible flaw incapable of detracting from the value of a statutory return of income. The criterion to judge the validity or otherwise of the return is supplied by the question whether the assessee could be prosecuted under Section 52 of the Income Tax Act in case the return were found to be wrong or the verification to be false. In my opinion the assessee could successfully plead not guilty on the ground that he had made no return. The same remarks would apply if the Income Tax Officer were to take action under Section 28 of the Act. The assessee has been paying income tax since the year 1920-21 and must therefore know the requirement of the Income Tax Law. I am, therefore, of the opinion that the answer to the question should be in the affirmative. I am supported in this view by the Patna High Court in Messrs. *Mohan Lal Hardeo Das* v. *Commissioner of Income-tax, Bihar and Orissa* (V I. T. C. 127)."

J. N. Aggarwal, for the Commissioner.

Kirpa Ram Bajaj, for the assessee.

JUDGMENT :—This is an income-tax reference, the question framed for decision being, whether the return furnished by the petitioner was an invalid return ?

The reference relates to the assessment for 1931-32 made on an association of individuals carrying on business as hide merchants with their head office at Jullundar in British India and a branch business at Basti Nau in the Kapurthala State. The Income Tax Officer issued the usual notice under Section 22 (2) of the Income Tax Act requiring the assessee to furnish

return in the prescribed form and verified in the prescribed manner, setting forth his total income during the previous year. The notice was accompanied by the printed form of return prescribed under Rule 19 of the Indian Income Tax Rules, 1922. The assessee sent back the form of return to the Income Tax Officer with the entries " about 800 " and " about 110 " in columns 2 and 3 respectively, against head 5, " business, trade, commerce, manufactures, etc." These figures were again qualified by the word "about" when entered in the column for "total". Besides this, the return did not show the period to which the income declared related, the space provided for that purpose in the form of verification having been left blank. Again, note 5 (*a*) attached to the return requires that, where the accounts are kept on the mercantile accountancy system, *i.e.*, book profit system, the return must be filled in the form prescribed thereunder. This was not done, although the system of accountancy adopted by the assessee was the mercantile or book profit system. The Income Tax Officer accordingly treated the return as invalid and held that the notice under Section 22 (2) had not been complied with. There was a further default in respect of a notice under Section 22 (4). The Income Tax Officer accordingly proceeded to make the assessment under Section 23 (4) of the Act. The assessment was followed by an application under Section 27 in which it was contended that the omission of the year of accounting in the verification form and of the statement contemplated by note 5 (*a*) were not such as could invalidate the return. No explanation was, however, offered for the qualification affixed to the figure of income entered in the return. The Income Tax Officer refused to re-open the assessment. The Assistant Commissioner of Income Tax rejected the appeal by the assessee. Thereafter the Commissioner, on being asked to do so, referred the question already stated for the decision of this Court.

A very similar case came before a special Bench of three Judges of the Rangoon High Court. This case is reported in *Commissioner of Income Tax* v. *A. R. A. N. Chettiyar Firm*. The assessee in that case made a return in the prescribed form and, under head 5, showed the profits or income in money-lending business about Rs. 5,000. None of the details required

under note 5 were given and the income tax authorities treated the return as no return at all and ultimately made the assessment under Section 23 (4) of the Income Tax Act. It was held they were justified in doing so.

It is unnecessary to give other authorities as we are in agreement with the Rangoon decision. In the case before us there is an additional circumstance, namely that, in the verification form, it was not shown to which period the income declared related. Had he been prosecuted under Section 52 of the Income Tax Act he could successfully have pleaded ' not guility ' on the ground that he had made no return. There is no question but that the decision of the income tax authorities is correct, and we would answer the question referred in the affirmative. The assessee will pay the Commissioner's costs.

Question answered in the affirmative.

[In the Lahore High Court.]

LAHORE ICE FACTORIES ASSOCIATION

v.

COMMISSIONER OF INCOME-TAX, PUNJAB.

Addision and Sale, JJ.

June 22, 1934.

Income Tax—Pooling Combinations—Assessability—Mode of Assessment—Reference—' Assessee ', meaning of—Income Tax Act (XI of 1922), Section 3.

Four individuals, one limited company, one registered firm and one unregistered firm entered into an agreement forming themselves into an association called the Lahore Ice Factories Association and agreeing to pool their profits to avoid competition. The Association was assessed as ' an association of individuals ' engaged in business. It was contended on its behalf that it was not a company or a firm or an association of individuals and it did not carry on business and so could not be assessed under Section 3 of the Income Tax Act. The High Court held that the question whether the ' pool ' was an assessee under Section 3 of the Income Tax Act and whether the assessment should be made

individually or collectively were questions of law and directed the Commissioner to refer these questions to the High Court.

Cases referred to :

JAI DAYAL MADAN GOPAL *In re*, [1933] (I.L.R. 54 All. 846; A.I.R. 1933 All. 77 ; 143 I.C. 390 ; 1933 I.T.R. 186).

SHEO DAYAL KHEMKHA *v.* JOHARMAL MANMUL [1924] (I.L.R. 50 Cal. 549 ; A.I.R. 1924 Cal. 74 ; 75 I.C. 81).

Petition under Section 66 (3) of the Income Tax Act praying that the High Court may direct the Commissioner of Income Tax, Punjab, North West Frontier Province and Delhi Province, Lahore, to draw up a statement of the case and refer the same to the Court for opinion on the points of law involved in the case.

Kirpa Ram Bajaj, for the petitioner.
J. N. Aggarwal, for the respondent.

JUDGMENT.—An association known as the Lahore Ice Factories Association has applied under sub-Section (3) of Section 66, Income Tax Act, against an order of the Commissioner refusing to state a case on the ground that no question of law arises.

This association was formed by an agreement dated the 18th March, 1930, (a copy of which is at page 7 of the papers submitted with this application by which the seven entities mentioned in paragraph 2 of the agreement combined to pool their profits with the object of avoiding competition. The Association has been assessed in respect of profits amounting to Rs. 1,15,572 for the year 1931-32 ; and the main question raised in this reference is whether such an association, as was formed by this agreement, is an assessee within the meaning of Section 3 of the Income Tax Act.

The Association has been assessed by the income tax authorities "as an association of individuals" which was engaged in business; and it was held that the profits thus earned were clearly taxable. The main point urged by counsel in this application is that the association is not an association of individuals, and not engaged as such in trade or business ; and is not therefore a unit to which Section 3 of the Income Tax Act can apply. Accordingly it is contended that the Association is not liable to be taxed in its collective capacity.

In rejecting the application to state a case, the Commissioner has observed that the question whether the total profits of this Association were liable to be assessed collectively was not raised in the grounds of appeal to the Assistant Commissioner against this assessment. Actually, the first ground of appeal was "that the assessee denies its liability to be assessed under the Act." We accept the contention of the applicant's counsel that this general ground of appeal sufficiently covers the two main points of law which the applicant sought to be referred for the decision of this Court. It is unnecessary to repeat these two questions here as we are of opinion that an important point of law is raised, which we propose to formulate on which the Commissioner should be required to state a case for the decision of this Court.

It has been urged by counsel for the applicant that the Association does not engage in trade in the sense of doing any business with outsiders and that its functions are too heterogenous to fall under Section 3 of the Income Tax Act. It appears that the seven share-holders of this Association consist of four individuals, one limited company, one registered firm and one unregistered firm. Under these circumstances counsel argues that the Association cannot be described either as a company or a firm or an association of individuals. A firm for the purposes of the Income Tax Act is a collective term for a number of persons who enter into partnership with one another, but it has been held in such authorities as *Sheodapal Khemkha* v. *Joharmul Manmul* and *Jai Dayal Madan Gopal, In re*, that firms as such cannot enter into partnership with each other. The point therefore whether the association in question can be held to be an assessee within the meaning of Section 3 of the Income Tax Act is clearly a question of law which it would be proper for the Commissioner to refer for the decision of this Court.

After hearing counsel for the applicant we would formulate two questions for reference as follows:—

(1) Is the pool an assessee under Section 3 of the Income Tax Act and if so under which category?

(2) How should the assessment be made in the present case, that is, whether collectively or individually?

We accept this application to the extent of requiring the Commissioner to state a case and refer these two questions for the decision of this Court.

Application allowed.

[IN THE LAHORE HIGH COURT.]

NEKI DEVI

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June 27, 1934.

INCOME TAX—REFERENCE—QUESTION OF LAW—INSUFFICIENCY OF METHOD OF ACCOUNTING TO DEDUCE PROFITS—POINT NOT RAISED BEFORE COMMISSIONER—INCOME TAX ACT (XI OF 1922), SECTIONS 13 and 66 (2).

The question whether the evidence tendered before the income tax authorities established that the assessee's method of accounting was such that the profits and gains could not be properly deduced therefrom is not a question of law and cannot be referred if there was evidence before the income tax authorities to come to a finding on the question and they have acted on such evidence.

An Assistant Commissioner who had heard an appeal was appointed Officiating Commissioner and he revised his own order under Section 33 as Commissioner and rejected an application under Section 66 (2). The assessee applied to the High Court under Section 66 (3) for a reference on the question whether the Assistant Commissioner was competent to dispose of the application under Sections 33 and 66 (2) : Held, *that, as the competency of the Commissioner to deal with his own order as Assistant Commissioner was not raised in the application under Section 66 (2) the High Court had no power to require the Commissioner to state a case on this question.*

Cases referred to :

COMMISSIONER OF INCOME TAX, BURMA *v.* C. P. L. E. CHETTIAR CONCERN [1934] (I.L.R. 12 Rang. 322; 1934 I.T.R. 201).

V. P. R. P. L. FIRM *v.* COMMISSIONER OF INCOME TAX, BURMA [1933] (I.L.R. 11 Rang. 397; 1933 I.T.R. 319).

Petition under Section 66 (3) of the Indian Income Tax Act, praying that the Commissioner of Income Tax, Punjab, be directed to state the case and to refer certain questions of law to the High Court.

Shamair Chand and *Qabul Chand*, for the petitioner.

J. N. Aggarwal, for the Commissioner.

JUDGMENT.—This is an application by *Shrimati* Neki Devi for a mandamus to compel the Commissioner of Income Tax to state a case and to refer certain questions of law to this Court for decision in connection with an assessment made upon her.

The assessee was served under Section 22 (4) of the Income Tax Act with a notice calling upon her to produce complete accounts for the accounting period 1931-32. Her brother Sakhira Ram, who is her representative, produced a cash book and ledger written in English which the Income Tax Officer found to be incomplete. The Income Tax Officer also found that, besides the books produced before him, the assessee had an original set of books maintained in Hindi which had been withheld. He discovered that the books produced did not contain any account of certain large debts owed by various people named by him. Nor did they contain any capital account which would indicate the extent of the assessee's investments. An omission was even found in the interest account which was produced. For these reasons the Income Tax Officer refused to adopt the books produced before him as the basis for his assessment and proceeded to frame his own estimate which he fixed at Rs. 20,000 as compared with the figure of 18,200 of the previous year. It may be mentioned that the return of the assessee was for the sum of Rs. 12,052.

There was then an appeal to the Assistant Commissioner of Income-tax. The facts given in the assessment order were not challenged in the grounds of appeal but the ommissions in the accounts were explained as being due to the fact that the assessee's method of accounting was on the cash basis under which balances were not brought forward. The appeal was rejected on the ground that the accounts produced were

incomplete and did not reflect the assessee's true income. Thereafter the assessee put in two applications to the Commissioner of Income Tax under Sections 33 and 66 (2) of the Income Tax Act.

The Commissioner of Income Tax interfered under Section 33 and reduced the assessable income to Rs. 16,904. He then gave the assessee an opportunity to withdraw from her application under Section 66 (2) but she refused to do so. He refused to state a case to this Court for the following reasons :—

The existence of original books in Hindi was not denied by the assessee and they had been produced in the past. Besides, it was not explained why they were not produced when the notice under Section 22 (4) served called for complete accounts. There was thus a clear default within the meaning of Section 23 (4) and thus there was justification for the assessment being made to the best of the Income Tax Officer's judgment. As the books had been found to be unreliable owing to the omission of important accounts he found that the assessment had been properly made under Section 23 (4) and that the plea of the assessee that the system of accounting was on the cash basis was merely frivolous, there being no question of the system of accounting before the Income Tax Officer when he was considering whether the accounts produced before him were to be accepted or rejected. The question raised, therefore, in his opinion did not arise from the facts of the assessment. The real question which arose according to him was whether the method of accounting adopted by the assessee was such that the profits and gains of his business could be properly deduced therefrom. As this was a question of fact determined by the Income Tax Officer on evidence he found that no question of law arose.

The question of law which we were asked to frame was whether the evidence tendered before the authorities established that the method of accounting was such that the profits and gains of the business could not be properly deduced therefrom. It seems to us that this cannot be said to be a question of law in the present case, for there was undoubtedly evidence upon which the income tax authorities acted. A similar question arose, before a Division Bench of the Rangoon Court in *V. P. R. P. L. Firm* v. *Commissioner of Income Tax, Burma* and it was held that

the question was one of fact and the finding on the question being based upon material before the income tax authorities, no question of law arose. In our opinion no question of law arises in this connection.

The only other point taken was that the two applications under Sections 33 and 66 (2) should not have been heard by the Commissioner of Income Tax as he was the Assistant Commissioner who had heard the appeal from assessment. The Commissioner of Income Tax had gone on leave and he was then officiating for him. It has already been pointed out that the Income Tax Commissioner actually reduced the income tax considerably and was not prejudiced by the fact that he had heard the appeal. Further this is not a question which arises under the Income Tax Act. It was held in *Commissioner of Income Tax, Burma* v. *C. P. L. E. Chettiar Concern* (I. L. R. 12 Rang. 322) that the High Court has no jurisdiction under Section 66 (3) of the Income Tax Act to order the Commissioner of Income Tax to state a case and refer a question for the consideration of the High Court which the assessee has not duly required the Commissioner to refer under Section 66 (2). There is no doubt that this is the correct law and as the question whether he was competent to deal with the application under Section 66 (2) was not required to be referred by the Commissioner, this point cannot be taken before us. We might also note that there is nothing in the Act to prevent him from disposing of the application in question.

For the reasons given we dismiss this application with costs.

Application dismissed.

[IN THE LAHORE HIGH COURT.]

AHMAD DIN ALLA DITTA

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June 20, 1934.

INCOME TAX—RENEWAL OF PROMISSORY NOTE—INTEREST ADDED TO PRINCIPAL—ACCOUNTS KEPT ON MERCANTILE SYSTEM—WHETHER INTEREST CHARGEABLE TO INCOME TAX—INCOME TAX ACT ACT (XI OF 1922), SECTIONS 4 & 13.

The assessee who carried on money lending business took a renewal of a promissory note from a debtor. The interest which had accrued due on the old note amounting to Rs. 2,500 was added to the principal in the renewed note and was shown as income in the interest account of the assessee and taken as a credit entry in the accounts. The method of accounting employed by the assessee was admittedly the mercantile or book profit system. The Commissioner of Income Tax held that in view of the system of accounting adopted by the assessee, income tax was chargeable on the sum of Rs. 2,500 even though the assessee had not actually received the amount. On a reference by the Commissioner : Held, *that as the assessee had chosen to adopt the mercantile basis of accountancy it was upon that basis and that basis alone that he could be assessed to income tax, and the amount in question was properly chargeable with income tax.*

Cases referred to :

COMMISSIONER OF INCOME TAX, MADRAS *v.* SUBRAMANYAN CHETTIAR [1927] (I.L.R. 50 Mad. 765 ; 104 I.C. 645).

FEROZE SHAH *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1933] (1933 I.T.R. 219 ; I.L.R. 14 Lah. 682 ; 144 I. C. 685 ; A.I.R. 1933 P.C. 198).

LAKSHMANAN CHETTIYAR *v.* COMMISSIONER OF INCOME TAX, MADRAS [1929] (A. I. R. 1929 Mad. 675 ; 122 I. C. 510 ; 57 M.L.J. 60).

RAGHUNANDAN PRASAD SINGH *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA [1929] (I.L.R. 9 Pat. 48).

RAGHUNANDAN PRASAD SINGH *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA [1933] (1933 I.T.R. 113 ; I.L.R. 12 Pat. 305 ; 142 I.C. 446 ; A.I.R. 1933 P.C. 101).

Case stated by the Commissioner of Income Tax, Punjab and N.W.F. Province, under Section 66 (2), Income Tax Act.

The Statement of the Case was as follows :—

" In a combined petition under Sections 33 and 66 (2) of the Income Tax Act, the petitioner Sh. Ahmad Din a partner in the registered firm of Messrs. Ahmad Din Allah Ditta of Lahore Cantonment asks me to review the assessment of the firm for the year 1931-32, or in the alternative to refer to the High Court the following question, alleged to be a question of law, arising out of the order passed under Section 31 in the appeal against the assessment :—

" Whether under the circumstances of the case, the Income Tax Officer was justified in charging tax on a sum of Rs. 2,500."

2. The facts of the case are that Messrs. Haji Ahmad Din Allah Ditta is a registered firm, doing business in money-lending and the manufacture and sale of bricks and owns house property. The firm consists of two partners, Sh. Ahmad Din and Sh. Allah Ditta, each having equal shares. In connection with the assessment for 1931-32, the petitioner returned under Section 22 (2) of the Act, a net income of Rs. 1,961-8-4 from property, a net profit of Rs. 6,021-5-1 from money-lending and a loss of Rs. 7,541-6-0 in the brick kiln business. This reference is concerned only with the income from the money-lending business and will be confined to it alone. In a statement of the income and expenses of the money-lending business attached to the return, the assessee gave the following details :—

INTEREST INCOME.

		Rs.	As.	P.
By income from interest on deposits in the Peoples Bank of Northern India, Gujrat	....	3,006	12	7
By income from interest on deposit in the Lyallpur Bank, Gujrat	....	639	14	6
By income from interest on deposits in the Punjab National Bank, Lahore	....	2,536	13	0
By interest from sundry debtors	....	887	0	0
Total	....(?)	7,270	8	1

A note was added to the return that "the actual receipts (from interest) amounted to Rs. 887. The sum of Rs. 2,500 was included on account of interest on the renewed pro-notes executed by Sh. Hakim Din Pir Mahi of Sialkot. As this amount has not actually been received as income, it has not been shown in the interest income."

From the above total of Rs. 7,270-8-1, a sum of Rs. 1,249-3-0 was deducted as interest paid by the assessee, the net income from money-lending business offered for assessment being thus Rs. 6,021-5-1. On an examination of the accounts produced by the assessee the Income Tax Officer found that the item of Rs. 2,500 referred to above, had been duly credited to the interest account along with the other items detailed above. It was however represented before him that the pronote was got renewed by the debtor because the latter had made no payment either towards the principal or towards interest so much so that later on a suit had to be filed against the debtor. There is no evidence on the file as to the institution of a suit beyond this verbal allegation before the Income Tax Officer. It was therefore argued before him that as the interest had not been received, it should not be included in the assessment. The Income Tax Officer rejected this claim of the assessee on the ground that the interest had been added to the principal and thenceforth borne interest and that it had been shown as income in the interest account in the assessee's own books. He, therefore, assessed it to income tax. Thereupon an appeal was filed before the Assistant Commissioner in which the objection raised was " that the inclusion of accrued interest in the renewed pronotes with a view only to save the transaction from becoming time-barred cannot be said to be income chargeable to tax within the meaning of Section 3 of the Income Tax Act ". The appeal was rejected by the Assistant Commissioner on the ground that the interest in question had been shown as income in the interest account of the assessee and was taken as a credit entry according to the system of accountancy followed by him.

3. The assessee has now asked me either to accept his contention under Section 33, or in the alternative to refer the question noted in para. 1 above for the decision of the High Court. I have refused to interfere under Section 33, and therefore

proceed to state a case to the High Court under Section 66 (2). The method of accounting found by the Income Tax Officer and admitted before me as regularly employed by the assessee is the mercantile system of accountancy. Under this system entries are made in the accounts on the date not of receipt of money or expenditure of money but on the date of transactions irrespective of the date of payment. A profit and loss account prepared on this basis is accepted as evidence of the assessee's income and assessment is made accordingly. If any part of these "book profits" is later on found to have become irrecoverable it is deducted from the assessment as a bad debt. Now it will be interesting to note here that the sum of Rs. 6,383-8-1 returned by the assessee and offered for assessment as interest received from various banks includes a sum of Rs. 4,647-0-6 which represents the aggregate of a number of items of interest which were not actually realized but were merely adjusted and included in the renewed receipts of fixed deposits. The assessee has tried to distinguish the case of banks from individual depositaries on the ground of security, but the difference is only one of degree. It is therefore the method of keeping accounts according to which the assessee regularly enters in his profit and loss account the income which may not have been actually received, but is treated as such by the assessee for all the purposes of his business and its financial valuation which must form the basis of assessment.

In *Subramanyan Chettiar* v. *Commissioner of Income Tax*, on a similar question coming before it, the Madras High Court declared: "The assessee in common with most of the business firms in India has chosen to adopt the mercantile basis of accountancy and not the cash basis. He cannot for the purposes of more conveniently carrying on his own business adopt the mercantile basis and then for the purpose of income-tax assessment adopt the cash basis. What the assessee seeks to do is whilst adopting the mercantile basis in regard to all the other entries of interest in his accounts to adopt an entirely different basis, *i. e.*, cash basis for the purpose of this one entry and to argue that interest had never been received in British India although it is entered as a profit in exactly the same way as all other credits of interest, all the other entries

being treated on the mercantile basis as money actually received. In our view once an assessee has adopted the mercantile basis of accountancy it is upon that basis and upon that basis alone that he is to be assessed. It would be an impossible position if an assessee after having adopted the mercantile basis were to call upon the Income Tax Officer to make a long and difficult inquiry with regard to the various items entered as profit in the accounts of the assessee in order to prove that sums were actually received in British India.

In *Secretary to the Board of Revenue* v. *Al. Ar. Rm. Arunachalam Chettiyar* which the assessee's counsel has cited before me in support of his contention there is no suggestion that the dispute related to any entry in the accounts of the assessee or involved any question of the method of accounting adopted by the assessee, but there the sole question was whether interest which became due but was not realized was assessable or not. But even in that judgment it is clearly implied that interest, if it is adjusted in the accounts, as in the present case, is assessable to income tax. Again, it will be relevant to quote the following passage occurring on page 219 of *Rustomji's Limitation Act*: "A transaction between a creditor and debtor whereby they agree that the amount due for interest should be added to principal and the whole amount carried forward in the creditor's books as being due for principal is not different from a transaction wherein the creditor receives actual payment of the amount due for interest and lends the same back again to the debtor. When both parties agree to such a settlement and the accounts are so adjusted, the adjustment operates as a payment of interest."

In the present case the renewal of the pronote is a proof of the parties having agreed to such a settlement which is accompanied by an adjustment in the assessee's books. It may be mentioned that the payments of interest to his creditors similarly adjusted by an assessee debtor in his books are invariably admitted and allowed as deduction in the assessment of the debtor in accordance with Section 10 (3) which is practically on the same lines as Section 13. What therefore applies to expenses must equally apply to income. Moreover the institution of bad debts pre-supposes the assessment of what are called "book profits" and no claim for bad debts should ever arise if the only test of

the assessability of any item of interest were the cash receipt of money. I am, therefore, of opinion that the question should be answered in the affirmative."

Kirpa Ram Bajaj, for the assessee.

J. N. Aggarwal, for the Commissioner.

JUDGMENT :—The question of law referred by the Commissioner of Income Tax in this case is whether in the circumstances of the case the Income Tax Officer was justified in charging tax on a sum of Rs. 2,500. The facts are as follows :—

The assessee returned *inter alia* a net profit of Rs. 6,021-5-1 from money-lending. This sum was made up as follows :

		Rs.	As.	P.
By income from interest on deposits in the Peoples Bank of Northern India, Gujrat	....	3,006	12	7
By income from interest on deposits in Lyallpur Bank, Gujrat	....	639	14	6
By income from interest on deposits in the Punjab National Bank, Lahore	....	2,536	13	0
By interest from sundry debtors	....	887	0	0
Total	....(?)	7,270	8	1

From this total Rs. 1,249-3-0 were deducted as interest paid by the assessee, the net income from money-lending business being thus declared at Rs. 6,021-5-1. A note was added to the return to the effect that the actual receipts amounted to Rs. 887 and that the sum of Rs. 2,500 was not included on account of interest on the renewed promissory note executed by *Sheikh* Hakim Din Pir Mahi of Sialkot because this amount had not actually been received as income.

When the accounts were examined it was found by the Income Tax Officer that the above item of Rs. 2,500 had been duly credited to the interest account along with the other items detailed above. It was represented to him that an old promissory note was renewed and that interest was added in the new promissory note and that as the interest had not been collected in cash, it should be excluded from assessment. This claim was

rejected on the grounds that as the interest had been added to the principal in the new promissory note, it thenceforward bore interest and that it had been shown as income in the interest account in the assessee's own books. The Assistant Commissioner rejected the appeal on the ground that the interest in question had been shown as income in the interest account of the assessee and was taken as a credit entry according to the system of accountancy followed by him.

The assessee then asked the Commissioner of Income Tax either to accept his contention or in the alternative to refer the question for the decision of this Court. The Commissioner refused to interfere under Section 33 but stated the case to the High Court under Section 66 (2). He found that the method of accounting admitted before him to have been regularly employed by the assessee, was the so-called mercantile system of accountancy or book profit system. Under this system entries are made in the account on the date not of the receipt of money or expenditure of money but on the date of the transactions irrespective of the date of cash payment. A profit and loss account prepared on this basis is accepted as evidence of the assessee's income and assessment is made accordingly. If any part of these "book profits" is later on found to have become irrecoverable, it is deducted from the assessment as bad debt. According to this method the assessee regularly entered in his profit and loss account income which might not have been actually received but was treated as such by the assessee for all purposes of his business and the Commissioner was of opinion that it was the financial valuation, according to this method, which must form the basis of assessment.

In our judgment the opinion of the Commissioner is correct. It was held in *Commissioner of Income Tax, Madras* v. *Subrahmanyan Chettiyar* (I. L. R. 50 Mad. 765), that as the assessee had chosen to adopt the so-called mercantile basis of accountancy in keeping his accounts, it was upon that basis and upon that basis alone that he was to be assessed to income tax under Sections 10 and 13 of the Act. Of course, as already stated, if the debt turns out to be a bad debt later on, allowance is then made for it. Another Special Bench of the Madras High Court took the same view in *Lakshmanan Chettiyar* v. *Commissioner of Income Tax* (A.I.R. 1929 Mad. 675).

In *Raghunandan Prasad* v. *Commissioner of Income Tax, Bihar & Orissa* (I.L.R. 9 Pat. 49) it was held that where a mortgagee keeps his accounts on the *cash* system and his books of account contain no entries showing that he has realized or treated as realised the interest stipulated for in a bond which provides for unpaid interest to be added to the principal loan at the end of stated periods the interest is assessable only when it is actually received by the mortgagee. This case went to the Privy Council where it was decided [see *Raghunandan Prasad Singh* v. *Commissioner of Income Tax* (I. L. R. 12 Pat. 305)] that when a mortgage has been accepted in discharge of the principal and interest due under an earlier mortgage, and the mortgagees' books of account do not treat the interest as being thereby paid, the interest does not become a profit or gain assessable to income tax until the amount is realised. It follows that it depends upon the method of accountancy as to whether the interest is taxable when it accrues or when it is paid.

There is another decision of their Lordships of the Privy Council in *Feroze Shah* v. *Commissioner of Income Tax, Punjab* (I. L. R. 14 Lah. 680), which may be referred to. In assessing the appellant to tax under the Indian Income Tax Act in respect of his profits as a timber merchant the Income Tax Officer and the Assistant Commissioner found (1) that according to the appellant's usual method of keeping his books sales were recorded when they were effected, irrespective of whether payment was then made, and (2) that, as the rate of profit could not be deduced from the books, a flat rate of 32½ *per cent.* on sales, which had been applied in the two previous years without objection, should be applied. Having regard to the first finding and to Section 13 of the Act sales made during the year of accounting were brought into charge, although they were not recorded in the books until later. The appellant sought to have a case stated for the opinion of the High Court relative to the two findings above stated, the second not being challenged as to principle. It was held by their Lordships that the High Court had rightly refused to require a case to be stated under Section 66 of the Act, as the findings in question were findings of fact. In the course of their judgment their Lordships stated as follows:

" Too much emphasis had, they think, throughout the case been attached to the use by the Income Tax Officer and the Assistant Commissioner of the term 'mercantile system'. The finding of both, in its essential substance, was that the appellant's system of accounting, by whatever name called, required the inclusion in his accounts of 1926-27 of the Rs. 90,618 referred to, and the only question open to judicial determination is whether there was any evidence before these officers upon which they might so find."

In the case before us the system of accounting is not disputed and it follows that the sum of Rs. 2,500 in question was properly included in the assessment.

Our reply to the question therefore, is in the affirmative. The Commissioner will get his costs from the assessee.

Question answered.

[IN THE ALLAHABAD HIGH COURT.]

BEHARI LAL CHATTERJI

v.

COMMISSIONER OF INCOME TAX, U.P.

Niamatullah and Bennet, JJ.

October 27, 1933.

INCOME TAX—BEST JUDGMENT ASSESSMENT—RETURN NOT SIGNED AND VERIFIED—POWER TO MAKE BEST JUDGMENT ASSESSMENT—ASSESSMENT UNDER SECTION 23 (4)—POWER TO DETERMINE TAX PAYABLE AND TO ISSUE NOTICE OF DEMAND—INCOME TAX ACT (XI OF 1922), SECTION 22 (1), (2) and (3), SECTION 23 (2) & (4).

An assessment to the best judgment can be made under Section 23 (4) of the Income Tax Act if there is a failure to make a return under Section 22 (1) or 22 (2). It is not necessary for applying Section 23 (4) that there should be a non-compliance with a notice under Section 22 (4).

In making an assessment under Section 23 (4), the Income Tax Officer has power to determine not only the amount of income but also the tax payable upon it, and, therefore, a notice can be validly issued under Section 29 when the Income Tax Officer has made a best judgment assessment under Section 23 (4).

Where a return is not signed and verified there is no valid return at all and the Income Tax Officer would be justified in making an assessment to the best judgment under Section 23 (4). Such a return is not an 'incomplete' return within the meaning of Section 23 (2) but no return at all.

Cases referred to:

ABHEY RAM CHUNNI LAL [1933] (1933 I.T.R. 126; 145 I.C. 562; A.I.R. 1933 All. 197).

BASDEO *v.* JOHN SMIDT [1899] (I.L.R. 22 All. 55; 1899 A.W.N. 172).

CHHOTEY LAL, *In re* [1931] (137 I.C. 77; A.I.R. 1932 All. 83; 5 I.T.C. 466.)

SHIB DEO MISRA *v.* RAM PRASAD [1925] (I.L.R. 46 All. 637; 80 I.C. 938; A.I.R. 1925 All. 79).

Case stated by the Commissioner of Income Tax, United Provinces, under Section 66 (2) of the Income Tax Act (XI of 1922). C.M.A. No. 439 of 1932.

P. L. Banerji and *H. P. Sen*, for the assessee.

K. Verma, for the Commissioner.

JUDGMENT.—This is an Income tax reference by the Commissioner of Income Tax to this Court. The following three questions have been referred to this Court:

"(1) Whether the assessment made without issuing a notice under Section 22 (4) is not an assessment to the best of judgment as contemplated by Section 23 (4) and is illegal.

(2) Whether the issue of a notice of Demand under Section 29, with respect to an assessment made under sub-Section (4) of Section 23, wherein no power to determine the sum payable by the assessee on the basis of such assessment has been confered on an Income Tax Officer, is illegal; and

(3) Whether a return made under Section 22 (2) on the form supplied to the assessee by the Income Tax Officer with the omission of signatures is an incomplete return contemplated by Section 23 (2) and the assessment in such case could not be made without issue of a notice under this section *viz.*, 23 (2)."

The facts of the case, as stated are that a notice under Section 22 (2) of the Income Tax Act was sent to the assessee

and time was extended and in compliance with that notice he sent a return which was not signed on any of its pages and was not verified. The Income Tax Officer held that no return at all had been sent, and, therefore, he made a best judgment assessment under Section 23 (4).

The first question which has been referred suggests that there is some necessary connection between Section 22 (4) and Section 23 (4). Section 23 (4) applies where there is a failure to make a return under Section 22 (1) or (2) or where there is failure to comply with all the terms of a notice issued under sub-Section (4) of Section 22. It is not correct, therefore to assume that in every case where Section 23 (4) is to apply there must be a non-compliance with Section 22 (4).

The next question (No. 4 in the printed record) is framed on the point that in Section 23 (4) the final words of the sub-section are that "the Income Tax Officer shall make the assessment to the best of his judgment." In sub-Sections (1) and (3) of Section 23, the language used is slightly different and it states that the Income Tax Officer shall "assess the total income of the assessee, and determine the sum payable by him on the basis of such return," or in the case of sub-section (3), "of such assessment." The learned Counsel desires to draw a distinction between the language of the three sub-sections, and he argues that as sub-section (4) does not specifically state that the Income Tax Officer shall determine the sum payable by the assessee, therefore the Income Tax Officer has no power to determine the sum payable. In other words, he argues that sub-Section (4) only empowers the Income Tax Officer to ascertain the amount of taxable income and does not empower him to calculate the amount of tax payable by the assessee. For this proposition the learned Counsel referred to *In re Chhotey Lal*, (137 I.C. 77) In that case the question at issue was whether the notice under Section 34 in regard to super-tax on the ground that some income had escaped assessment was valid. A Bench of this Court held that the words "had escaped assessment" could not apply, because the whole income had been assessed to income tax, although it had not been assessed to super-tax. The Bench however did hold that another portion of Section 34, would apply which refers to income which "has been assessed at too low a

rate." In the course of the judgment the Bench made a reference to the meaning of the words "assessed" and "assessment"; and the learned Counsel contends that what was stated in that ruling should be applied in the present case. But there are two reasons why we cannot accept his argument. In the first place as pointed out the question before that Bench was one of super-tax and the meaning of the words "escaped assessment" in Section 34. In the second place, the Bench by some oversight did not refer to the definition of the word "assessee" in Section 2 (2) of the Act. In this definition it is stated "assessee" means "person by whom income tax is payable." We would naturally interpret the word "assessment" in consonance with that definition; and we consider that the word "assessment" in Section 23 (4), means determining the total taxable income and the sum payable on it. Therefore we consider that a notice could be validly issued under Section 29, when the Income Tax Officer had made a best judgment assessment under Section 23 (4).

The last question concerns the return which was sent by the assessee without being signed or verified. The learned Counsel referred to the plaint in a civil suit and argued that under certain rulings a plaint, although not in regular form could be taken as of some effect. One of these rulings is *Basdeo* v. *John Smidt* (22 A. 55). There the point was taken for the first time in appeal that the plaint had not been duly signed by the plaintiff or by anyone authorized by him. It was held that this did not necessarily make the plaint void and that the defect might be taken to have been waived by the defendant and might have been cured by amendment at any stage of the suit and was not a ground for interference in appeal. In *Shib Deo Misra* v. *Ram Prasad* (46 A. 637) it was held that a plaint which had been filed without due verification could be verified at a later stage of the suit even after the expiry of limitation. We do not consider that any analogy can be drawn from a plaint. The specific section in the Income Tax Act dealing with the return in question is as follows:—

"22 (2). In the case of any person other than a company whose total income is, in the Income Tax Officer's opinion, of such an amount as to render such person liable to income tax, the Income Tax Officer shall serve a notice upon him requiring

him to furnish, within such period, not being less than thirty days, as may be specified in the notice a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income during the previous year."

It is a necessary ingredient of the return that it should be in the prescribed form and should be verified in the prescribed manner. It is provided in Section 52 of the Income Tax Act that: "If a person makes a statement in a verification........... which is false" he may be prosecuted under Section 177 of the Indian Penal Code. Importance, therefore, is attached to the verification and signature on the return. The question has been before this Court on previous occasions, and as recently as August 18, 1933, in Miscellaneous Case No. 387 of 1932, the application of *Mathura Das Chunni Lal* assessee, this Bench held that there was a failure on the part of the assessee to submit a proper return where the return under Section 22 (2) did not bear the verification required by the Act and did not bear the signature of the assessee, and further that this failure justified the best judgment assessment under Section 23 (4) by the Income Tax Officer. There is another case in the matter of *Abhey Ram Chunni Lal*. In this there was a failure to make a return of income tax in regard of the different branches of the business of the assessee, and it was held that the assessee had deliberately failed to comply with Section 22 (2) and that the Income Tax Officer was entitled to make a best judgment assessment under Section 23 (4).

It was further argued by the learned Counsel that the failure to sign and verify the return is a matter which will come under Section 23 (2). That sub-section refers to the case where "the Income Tax Officer has reason to believe that a return made under Section 22, is incorrect or incomplete". The learned Counsel argued that in the present case the return was incomplete, because signatures and verification were lacking; but we do not consider that the word "incomplete" in Section 23 (2) can cover the defect in the present case, because in that sub-section it is laid down that the Income Tax Officer should send notice to the assessee requiring him to produce evidence on the point. Now evidence would not be required for

the purpose of adding the verification or the signature to a return. Therefore, incompleteness, which is contemplated by the sub-section, is not the incompleteness which arises from non-verification and want of signature For the reasons given above we consider that the defects in the return in the present case do not bring the return under Section 23 (2) and, therefore, the answer to the last question is against the assessee.

As the case for the assessee fails on all points, we direct that the assessee should pay costs, including the costs to the Department, which we assess at Rs. 150. Let a copy of our order be sent to the Income Tax Commissioner.

Reference answered accordingly.

[IN THE LAHORE HIGH COURT.]

DIWAN CHAND

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June 26, 1934.

INCOME TAX—REFERENCE—METHOD OF ACCOUNTING—ARBITRARY ASSESSMENT—INCOME TAX ACT (XI OF 1922), SECTIONS 13 AND 66 (2).

Under the proviso to Section 13 of the Income Tax Act, the Income Tax Officer is the sole arbiter on the question of the possibility of deducing the income, profits and gains from the method of accounting employed by the assessee and if on adequate evidence the Income Tax Officer finds that the accounts are not maintained in such a way as to indicate the true income, profits or gains, the Commissioner cannot be required to refer the case to the High Court.

GOKUL CHAND JAGANNATH *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1926] (94 I. C. 128 ; 2 I. T. C. 180 ; A. I. R. 1926 Lah. 446) followed.

Petition under Section 66 (3), Indian Income Tax Act, 1922, praying that the Commissioner, Income Tax, Punjab and N.W.F.P., be directed to state a case and refer the same to the High Court. [No. 396 of 1933.]

D. C. Ralli, for the assessee.

J. N. Aggarwal and *Asa Ram Aggarwal*, for the Commissioner.

JUDGMENT :—The assessee, Diwan Chand Kabari of Rawalpindi Cantonment, asked the Commissioner of Income Tax to make a reference to the High Court for decision of certain questions alleged to be questions of law which he stated arose in connection with the assessment. The Commissioner refused to do so and the petitioner has applied for a mandamus.

The facts are as follows :—The Income Tax Officer estimated Rs. 4,000 as the income from the sale of second hand tyres and tubes etc., and Rs. 4,023 from interest from the money-lending business. As regards the first item, the assessee declared his total sales to be Rs. 3,259 against Rs. 12,372 in the previous year. An explanation was called for as to this fall in the sales and no satisfactory reply was received. The Income Tax Officer thereupon rejected the sales account and proceeded to assess the petitioner under the proviso to Section 13 of the Act. There was an appeal to the Assistant Commissioner who again went into the accounts and found that no proper goods account had been maintained. The sale declared had only been sorted out on a sheet of paper. It was alleged before the Assistant Commissioner that no purchase had been made by the assessee during the accounting period but the Assistant Commissioner found after going into the books that this statement was incorrect and that as a matter of fact purchases had been made during the year and no account of them kept. He therefore held in connection with the second hand tyres and tubes business that the method of accounting adopted was such that the true income could not be ascertained therefrom and that the Income Tax Officer was right in computing the income upon such basis and in such a manner as he might determine. Further with respect to the money-lending business the Assistant Commissioner found that no proper accounts had been produced and that the books which were produced did not show the disposal of large sums of capital realised. This being the state of affairs, the Income Tax Officer had no alternative but to assess in the manner he did.

On these facts the Commissioner of Income Tax held that the only question which arose was whether the accounts were maintained in such a way that they indicated the true income of the assessee. This he said was a question of fact which had been determined by the Income Tax Officer and the Assistant

Commissioner on adequate evidence and he therefore refused to refer the case as no question of law arose.

On the above fact it seems to us that this application must fail. It was held by a Bench of this Court in *Gokal Chand Jagannath* v. *Commissioner of Income Tax, Punjab*, that under the proviso to Section 13 the Income Tax Officer is the sole arbiter on the question of the possibility of deducing the income, profits and gains of the assessee from the method of accounting employed by him.

For reason given it seems to us that the income-tax authorities acted on adequate evidence and that no question of law arises for decision. We dismiss the petition with costs.

Application dismissed.

[IN THE LAHORE HIGH COURT.]

SAYAD ASHGAR ALI SHAH

v.

ACHUR MAL AND ANOTHER.

Addison and Beckett, JJ.

June 6, 1934.

INCOME TAX—EVIDENCE AS TO DOCUMENTS PRODUCED BEFORE INCOME TAX AUTHORITIES—PRIVILEGE—INCOME TAX ACT (XI OF 1922), SECTION 54.

Section 54 of the Income Tax Act excludes not only evidence as to the contents of documents produced before the income-tax authorities but also evidence of the fact that account books had been produced before them. Income-tax authorities cannot therefore be summoned to give evidence that certain books had been produced before them.

First Appeal from a decree of the Subordinate Judge of Ludhiana. [Appeal No. 991 of 1930].

Bashir Ahmad, for the appellant.

Achru Ram, for the respondent.

JUDGMENT.—These are two connected appeals, both arising out of a mortgage created by Sayad Asghar Ali Shah, the defendant, in favour of Lala Gurdit Chand, father of the

plaintiffs, on the 3rd May, 1916. The validity of this mortgage is not in dispute, and the only dispute is with regard to payments that have already been made thereon.

[After referring to the facts of the case which are not material for this report, his Lordship proceeded.]

The payment made in 1922 is the only payment which the defendant has been able to prove by any other evidence than his own oral statement. A very much larger amount was already due by that time in the way of interest, and it was certainly for him to show that this payment was made in reduction of the capital sum due on the mortgage. He has no evidence of his own to offer on this point and the only argument urged on his behalf is that he has been improperly deprived of the use of the account books maintained by the defendants or their father to support his allegations. With regard to these accounts books, one of the plaintiffs has stated on oath that his father, although a rich man, conducted his dealings in such a way that there was no need for him to maintain any regular books of account, and the account books of the plaintiffs themselves were open to inspection.

In order to counter this assertion the defendant made an attempt to summon a member of the income-tax collection staff with a view to show that Gurdit Chand had at one time produced books of account before the income-tax authorities. The Commissioner of Income Tax refused to provide the necessary facilities, claiming privilege under Section 54 of the Income Tax Act, 1922. Under this section, no Court may require any public servant to produce before it any document produced before the income-tax authorities under the provisions of the Act, nor may it require him to give evidence before it in respect thereof. It is to be noted that the Act does not merely exclude evidence with regard to the *contents* of any documents which may be produced before the income tax authorities for purposes of assessment, but it forbids any evidence with regard to such documents. It seems to us that this provision is wide enough to exclude evidence to the effect that account books have been produced before the Income Tax Officer, and that the interpretation placed on the section by the Commissioner of Income Tax was correct.

[The remaining portion of the judgment is not material to this report.]

[IN THE RANGOON HIGH COURT.]

A. A. R. CHETTIYAR FIRM

v.

COMMISSIONER OF INCOME TAX, BURMA.

Page, C.J., Baguley, Ba U, Leach and Mackney, JJ.

June 13, 1934.

INCOME TAX—PENALTY—MAXIMUM AMOUNT—PRINCIPLES OF CALCULATION—BEST JUDGMENT ASSESSMENT—TRUE INCOME MUCH LESS—CALCULATION OF PENALTY—INDIAN INCOME TAX ACT (XI OF 1922), Sections 23 (4), 28 (1) and (3)

The assessees returned their assessable income at Rs. 6,310. The Income Tax Officer found that the assessees had not produced all their accounts and assessed their income at Rs. 75,892, under Section 23 (4) of the Income Tax Act. In an enquiry under Section 28 (3) the accounts were produced, it was found that the real income was Rs. 37,526, and a penalty of Rs. 7,125-12-0 was imposed, being the difference between the tax on the income declared by the assessees and the tax on the income on which the assessment was made. On appeal, the Assistant Commissioner gave credit to the assessees in respect of a further sum of Rs. 11,499, and reduced the amount of the penalty to Rs. 6,582-9-0, being the difference between the tax due on Rs. 75,892 and the tax due on Rs. 17,809. It was contended on behalf of the assessees that the maximum penalty that could be imposed under Section 28 (1) was the difference between the tax on Rs. 6,310 and the tax on Rs. 37,526. On a reference by the Commissioner: Held, *affirming the rule laid down in* Commissioner of Income Tax, Burma v. A. A. R. Chettiyar Firm (I.L.R. 12 Rang. 258), *that the maximum penalty which could be imposed under Section 28 (1) is determined by ascertaining the difference between the amount of the tax on the income set out in the false return and the amount of tax on the income in respect of which assessment has been made, and the amount of penalty imposed in this case had been properly determined by the income tax authorities.* Held further, *that the* quantum *of the penalty that is to be imposed under Section 28 within the statutory limit is a matter of fact and not of law and is to be determined by the income-tax authorities and not by the Court.*

Cases referred to:

COMMISSIONER OF INCOME TAX, BURMA v. A.A.R. CHETTIYAR FIRM [1933] (1933 I.T.R. 285; I.L.R. 11 Rang. 75; 142 I.C. 785; A.I.R 1933 Rang. 30).

EMPEROR v. HOOSENALLY & CO. [1920] (I.L.R. 43 Mad. 498; 1 I.T.C. 148; 38 M.L.J. 333; 55 I.C. 1003).

K. M. O. CHETTIYAR FIRM v. COMMISSIONER OF INCOME TAX, BURMA [1934] (I.L.R. 12 Rang. 268; 1934 I.T.R. 159).

Case stated by the Commissioner of Income Tax, Burma under Section 66 (2), Income Tax Act [Civil Ref. No. 4 of 1934].

Foucar, for the assessees.

Government Advocate, for the Crown.

PAGE, C.J.—The question propounded is—"Whether the amount of the penalty imposed in this case has been properly computed, having regard to the provisions of Section 28 of the Income Tax Act." The material facts are as follows:

For the purpose of assessment of income tax for the year 1930-31 the assessees, who carry on business as money-lenders at Maubin, returned their assessable income at Rs. 6,310. The Income Tax Officer, being satisfied "that the accounts produced did not contain the whole of the assessees money-lending transaction, and that the assessees had other accounts which were not produced" assessed their income at Rs. 75,892 under Section 23 (4) of the Act. The assessment at that figure is now final and conclusive. Thereafter proceedings were taken under Section 28 (1) of the Act for the purpose of imposing a penalty upon the assessees.

Section 28 (1) runs as follows:

"If the Income Tax Officer, the Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act is satisfied that an assessee has concealed the particulars of his income or has deliberately furnished inaccurate particulars of such income, and has thereby returned it below its real amount, he may direct that the assessee shall, in addition to the income tax payable by him, pay by way of penalty a sum not exceeding the amount of the income tax which would have been avoided if the income so returned by the assessee had been accepted as the correct income."

Now, under Section 28 (3):

"No order shall be made under sub-Section (1) or sub-Section (2), unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard."

At an enquiry held pursuant to Section 28 (3) the assessees "produced the accounts previously concealed, and the Income Tax Officer found that according to these books the assessees' income was Rs. 37,526," and imposed a penalty of Rs. 7,125-12-0 on the assessees, being "the difference between the tax on the income declared by the assessees and the tax on the income on which the assessment was made." On appeal the Assistant Commissioner gave credit to the assessees in respect of a further sum of Rs. 11,499 and reduced the amount of the penalty to Rs. 6,582-9-0, the penalty imposed "representing the difference between the tax due on the assessed income Rs. 75,892 and the tax due on Rs. 17,809." The order of the Assistant Commissioner was confirmed by the Commissioner. In these circumstances the assessees contend that the maximum penalty which could have been imposed under Section 28 (1) was the difference between the tax on Rs. 6,310 and the tax on Rs. 37,520. Mr. Foucar, on behalf of the assessees, submitted that the question to be decided was the amount of income tax that would have been avoided if the false return had been accepted as a corrct return on the date when the false return was made. He contended that as at that time the estimated assessment under Section 23 (4) had not yet been made it followed that the only two figures that could have been taken into consideration were (*i*) the amount of income set out in the false return and (*ii*) the amount of the true income as subsequently ascertained in the course of the inquiry pursuant to Section 28 (3). I do not see my way so to read the section. As the Commissioner has pointed out in his order of 17th January, 1934:

"When an assessee seeks to evade tax, the amount he tries to evade is the difference between the tax on his returned income and the tax on his real income. Granted. But Section 28 is not concerned with what the assessee tries to do; it is concerned with what the Income Tax Officer can do when he detects the evasion. And it measures the penalty by the amount of tax that Government would *in fact* have lost if the return had been accepted."

It appears to me, as my brothers pointed out in the course of the argument, that "the amount of income tax which would have been avoided if the income so returned by the assessee had been accepted as the correct income" is the amount of income tax which the assessees have been compelled to pay, but which they would not have paid if their false return of assessable income had been accepted as correct. Or, to put the matter in another way, the assessees have in fact paid income tax on X income, while if their false return had been accepted they would have paid income tax only on Y income. By paying income tax on Y, therefore, the assessees would have avoided paying income tax on X *minus* Y.

In *The Commissioner of Income Tax, Burma* v. *A. A. R. Chettiyar Firm*, it was held that

"the maximum penalty that can be imposed under Section 28 (1) is a sum representing the difference between the tax on the income declared by the assessees and the tax on the income ascertained under the Income Tax Act in respect of which the assessment has been made";

and in *K. M. O. Chettiyar Firm* v. *The Commissioner of Income Tax, Burma*.

"that in imposing the penalty the maximum limit that is placed upon the *quantum* is that the penalty must not exceed the difference between the amount of the tax on the income assessable under the Act, and the amount of the tax upon the assessable income as returned by the assessee. It the present case the Commissioner of Income Tax in the exercise of his discretion did not impose the maximum penalty, and in proceeding under Section 28 the income tax authorities ought to act fairly and reasonably in the circumstances of each case, as the Commissioner appears to have done in the present case. But the *quantum* of the penalty within the statutory limit that ought to be imposed is a matter of fact and not of law, and is to be determined by the income tax authorities, and not by the Court." (See also *King-Emperor* v. *Hoosenally & Co.*)

In my opinion the maximum penalty which can be imposed under Section 28 (1) is determined by ascertaining the difference

between the amount of the tax on the income set out in the false return and the amount of the tax on the income in respect of which the assessment has been made. But, as was laid down in *The Commissioner of Income Tax, Burma* v. *A. A. R. Chettiyar Firm*:

"Whether a penalty ought to be imposed, and, if so, the amount of the penalty, are matters that, subject to Sections 30 to 32, lie within the discretion of the Income Tax Officer, and upon these questions the assessees are entitled to be heard: (Section 28, sub-Section 3). In my opinion, in such an enquiry evidence adduced by the assessee purporting to disclose the real income of the assessee is relevant and admissible, not for the purposes of varying or affecting the assessment made for the purpose of imposing the tax under the Act, but in order to show either that no penalty ought to be imposed, or that the amount of the penalty ought to be less than the maximum prescribed under Section 28."

In our opinion the construction that was placed upon Section 28 in *The Commissioner of Income Tax, Burma* v. *A. A. R. Chettiyar Firm* was correct, and we answer the question propounded in the affirmative.

BAGULEY, J.—I agree.
BA, U, J.—I agree.
LEACH, J.—I agree.
MACKNEY, J.—I agree.

Reference answered accordingly.

[IN THE RANGOON HIGH COURT.]

THE COMMISSIONER OF INCOME TAX, BURMA

v.

R. JOHNSTONE.

Page, C.J., Baguley and Ba U, JJ.

June 13, 1934.

INCOME TAX—GRATUITY PAYABLE TO EMPLOYEE ON TERMINATION OF SERVICE—INSOLVENCY OF EMPLOYER—GRATUITY PAID BY OUTSIDER—CASUAL AND NON-RECURRING RECEIPT—INCOME TAX ACT (XI OF 1922), SECTIONS 6 (VI), 7 AND 12.

The assessee who was at one time in the service of the British India Steam Navigation Company as a purser joined Bulloch Brothers & Co., Ltd., who were the agents of that steamship company in Rangoon. There was an understanding between him and the latter company (but no legal contract) that he would be paid a gratuity on the termination of his service if it had been satisfactory. Bulloch Brothers & Co., subsequently went into liquidation. Lord Inchcape, who was interested in both the companies and who was also interested in the well-being of the assessee and his co-workers who were in a similar plight, voluntarily paid the assessee a sum equal to the gratuity which he expected from the company, and took an assignment of any claim that the assessee might have against the company. Income tax was levied on this sum under Sections 6 (vi) and 12 of the Act.

Held, *that the sum was neither 'salary' within Section 7 nor income derived from "other sources" within Section 6 (vi) or Section 12 but was exempt from income tax under Section 4 (3) (vii) as being a receipt of a casual and non-recurring nature not arising from the exercise of the assessee's occupation, or by way of addition to the remuneration of the assessee.*

Cases referred to:

COMMISSIONER OF INCOME TAX, BENGAL *v.* SHAW WALLACE AND COMPANY [1932] (I.L.R. 59 Cal. 1343; 1932 Comp. Cas. 276: 5 I.T.C. 211).

COMMISSIONER OF INCOME TAX, BURMA *v.* BOMBAY BURMA TRADING CORPORATION [1933] (I.L.R. 11 Rang. 172; 1933 I.T.R. 152).

COOPER *v.* BLACKISTON [1909] (5 Tax Cas. 347; 1909 A.C. 104).

COWAN *v.* SEYMOUR [1920] (7 Tax Cas. 372; 1920, 1 K.B. 500).

HERBERT *v.* J. A. MCQUADE (SURVEYOR OF TAXES) [1902] (4 Tax Cas. 489; 1902, 2 K.B. 631; 71 L.J.K.B. 884).

REED *v.* SEYMOUR [1926] (11 Tax Cas. 625).

SAUNDERS, *In re* [1931] (I.L.R. 54 All. 223).

TURTON *v.* COOPER (SURVEYOR OF TAXES) [1905] (5 Tax Cas. 138; 92 L.T. 863).

Case stated by the Commissioner of Income Tax, Burma, under Section 66 (1) of the Income Tax Act, XI of 1922 [Civil Ref. No. 3 of 1934].

Foucar, for the assessee.

A. Eggar, (Government Advocate) for the Crown.

PAGE, C. J.—In this case the Commissioner of Income Tax, Burma, under Section 66 (1) has referred for the determination of the Court the following question :

"Is the sum of Rs. 7,822 received by the assessee taxable in his hands?"

The sum in question was paid to Mr. R. Johnstone, the assessee, by Lord Inchcape. It appears that the assessee and four other persons had been in the service of the British India Steam Navigation Co. as pursers, and afterwards had been taken into the employment of Messrs. Bulloch Bros. & Co., Ltd. This company among other business acted as an agent in Rangoon for the British India Steam Navigation Co.

Now, Lord Inchcape, like his father before him, was interested in the affairs of the British India Steam Navigation Co., and the late Lord Inchcape was also a shareholder in Messrs. Bulloch Bros. & Co., Ltd. It further appears that there was an understanding between certain employees of Messrs. Bulloch Bros. & Co., Ltd. including the assessee and the company that upon the termination of their engagement each of such employees would receive from the company a gratuity if their services had been satisfactactory. According to the case that has been stated, however, the company was not bound to pay the gratuity to its employees, for the fund "was entirely at the disposal of the company." Unfortunately in 1932 Messrs. Bulloch Bros. & Co., Ltd. went into liquidation, and the assessee lost not only his means of livelihood as an employee of the company, but also the gratuity which he expected that he would have received from the company when he left their employment.

Soon after the company had gone into liquidation the present Lord Inchcape came to Rangoon, and "was made aware of the plight in which the assessee and other employees of the company stood." No doubt, feeling that he was specially concerned with the well-being of persons like the assessee and the four other ex-pursers who had served in the British India Steam Navigation Co., Ltd., Lord Inchcape was good enough to pay to these five persons respectively sums equivalent to the whole of the gratuity which they expected that they would have received from Messrs. Bulloch Bros. & Co., Ltd. if that company had

not become insolvent. On making these payments, Lord Inchcape received from the recipients an assignment of any right to a gratuity which they respectively might have against Messrs. Bulloch Bros. & Co., although for the purpose in hand none of the recipients are to be regarded as possessing any legal right to claim a gratuity from the company. In these circumstances this sum of Rs. 7,822 has been assessed to income tax upon the ground that it falls within Section 6 (*vi*) and Section 12 of the Act as being income derived from "other sources." The Assistant Commissioner conceded that the sum in question was not chargeable under the head "salaries" in Section 7 (1) because it was "not paid by an employer" and it is not pretended or contended that when he made this payment to the assessee, Lord Inchcape was acting or purporting to act as the agent of Messrs. Bulloch Bros. & Co. (In re *The Commissioner of Income Tax, Burma* v. *Bombay Burma Trading Corporation.*) In my opinion it is manifest also that this sum of Rs. 7,822 was not income of the assessee derived from "other sources" within Section 6 (*vi*).

In *Commissioner of Income Tax, Bengal* v. *Shaw Wallace and Company*, SIR GEORGE LOWNDES, delivering the judgment of the Judicial Committee, observed:

"The object of the Indian Act is to tax "income" a term which it does not define. It is expanded, no doubt, into 'income, profits and gains,' but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. This income has been likened pictorially to the fruit of a tree, or the crop of a field."

But who would doubt that this payment was a mere windfall? Admittedly, it was not a payment by the company; it was not a payment made to the assessee because he was in the service of the company, for before the payment was made his employment with the company has been terminated; and no one in his senses in the position in which the assessee was placed

could expect that the same good fortune would come his way again. This sum, therefore, was not chargeable either under Sections 6 and 7 or Section 12 of the Act.

On behalf of the assessee Mr. Foucar further urged that this payment was exempted from income tax under Section 4 (3) (*vii*). I think it was, and the learned Government Advocate very fairly did not present an argument to the contrary. Among the classes of income to which the Act does not apply are:

" Any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee."

The payment of the sum of Rs. 7,822 in the present case obviously was a receipt of a "casual and non-recurring nature ", and it did not "arise from the exercise of an occupation " by the assessee but was the outcome of the spontaneous and generous action of Lord Inchcape in affording help to the assessee in the time of trouble. (See *Rev. G. N. Herbert* v. *J. A. McQuade* (*Surveyor of Taxes*); *Turton* v. *Cooper* (*Surveyor of Taxes*); *Cooper* v. *Blackiston* (*Sureyor of Taxes*); *Cowan v. Seymour* (*Surveyor of Taxes*); *Reed* v. *Seymour* (*H. M. Inspector of Taxes*); *In the matter of J. C. Saunders, Bishop of Lucknow*).

For these reasons I would answer the question propounded in the negative. The assessee is entitled to his costs, five gold mohurs.

BAGULEY, J.—I agree.

BA U, J.—I agree.

Reference answered accordingly.

[IN THE MADRAS HIGH COURT]

COMMISSIONER OF INCOME TAX, MADRAS

v.

CHENGALVAROYA MUDALIAR.

Beasley, C. J., Ramesam and Sundaram Chetty, JJ.

May 8, 1934.

INCOME TAX—BUSINESS EXPENDITURE—MONEYS PAID TO GOVERNMENT AS CONSIDERATION FOR EXCLUSIVE PRIVILEGE TO EXCAVATE LIME SHELLS—CAPITAL EXPENDITURE—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 16 (2) (IX).

The assessee entered into an agreement with the Secretary of State for India for the excavation of lime shells within a particular area and undertook to pay to the Secretary of State a certain sum of money in twelve equal quarterly instalments in consideration of the exclusive privilege of excavating lime shells within the said area. In computing the income of the assessee derived from the excavation and sale of lime shells, the assessee claimed that the payments he had to make to the Secretary of State during the year under this agreement should be deducted. The revenue authorities thought that the payments so made were capital expenditure and not deductible. On a reference by the Commissioner: Held, *that the payments made could not be regarded as the price of the shells recovered, nor can they be regarded in any sense as rent; they were not made to carry on an already existing business or to earn a profit out of it, but were made for starting the particular venture and as such the expenditure was an initial expenditure of a capital nature and was not deductible as expenditure incurred for earning profits.*

Cases referred to:

ALAGANNAN CHETTY *v.* COMMISSIONER OF INCOME TAX, MADRAS [1928] (110 I.C. 629; 3 I.T.C. 44; 55 M.L.J. 66).

CITY OF LONDON CONTRACT CORPORATION *v.* STYLES [1887] (2 Tax Cas. 239; 4 T.L.R. 51).

SMITH & SON *v.* MOORE [1921] (2 A.C. 13; 90 L.J.P.C. 149).

Reference made by the Commissioner of Income Tax, Madras, under Section 66 (2) of the Income Tax Act, 1922. [O. P. No. 87 of 1933].

The material portion of the statement of the case was as follows:—

"For the year of assessment 1932-33 the "previous year" for the purpose of that assessment being the year ending 31st March, 1932, the petitioner was assessed on an income of Rs. 7,172. In computing this income the Income Tax Officer refused to deduct a sum of Rs. 11,775 which represented the amount paid by the petitioner to Government for the exclusive privilege of excavating chunam shells from certain Government lands. The petitioner entered into an agreement with the Secretary of State for India in Council represented by the Revenue Divisional Officer, Gudur, on the 29th June, 1930 for the excavation of lime shells in the Nellore District. A copy of this agreement is appended—marked Exhibit A. By clause (*ii*) of this agreement he agreed with the Revenue Divisional Officer to have the exclusive privilege of excavating chunam shells within the area specified in the agreement from the 1st July, 1930 to the 30th June, 1933 both days inclusive. And by Clause (*iii*) of the agreement the lessee (the petitioner) agreed to pay into the Sub-Treasury at Sulurpet or at any Government Treasury the sum of Rs. 27,750 in twelve equal instalments payable in advance on the 1st day of July and October, 1930, January, April, July and October, 1931 and January, April, July and October, 1932 and January and April, 1933 in consideration of the aforesaid exclusive privilege having been granted to him. The agreement contains various other clauses which are not relevant for the consideration of the point at issue in the case. The payments in question, *viz.*, Rs. 11,775 were made during the "previous year" (1931-32) under Clause (*iii*) of the agreement. The Income Tax Officer held that these payments were of a capital nature and were not therefore deductible in computing the income derived from the excavation and sale of lime shells. An extract of the Income Tax Officer's order is appended, marked Exhibit B.

On appeal the Assistant Commissioner confirmed the Income Tax Officer's order. An extract of his order is filed, marked Exhibit C.

The petitioner now requires me to refer to the High Court the following question and I refer it accordingly.

Question : " Whether the decision of the Assistant Commissioner that Rs. 11,775 is not deductible in arriving at the profits of the petitioner's business is correct in law."

The petitioner's contentions are that the payments represent the cost of lime shells and that he did not acquire a permanent asset by these payments and therefore the payments cannot be regarded as capital expenditure. In my opinion, the payments cannot be regarded as representing the cost of the shells excavated as they were not based on the quantity of shells excavated and were not dependent on any excavation being made at all. Regarding the contention that the payments are not of a capital nature because they did not result in the acquisition of a permanent asset, the case of " *Countess of Warwick* " *Steamship Company, Limited* v. *Ogg* (8 Tax Cas. 652) and the judgment of Lord Mclaren in the case of the *Granite Supply Association Ltd.* v. *Kitton* (5 Tax Cas. 168) may be cited as authority for the view that a capital expenditure need not necessarily result in the acquisition of any asset at all. This was also the view taken by this Court in *Alagannan Chetty* v. *Commissioner of Income Tax, Madras* (3 I.T.C. 44). The payments in question were not made as an outlay in an already acquired business, in order to carry it on and to earn a profit out of this expense as an expense of carrying it on; but were made to acquire the business. I am accordingly of opinion that the payments represent capital expenditure and are not admissible as deductions in computing the petitioner's income from his business. I am supported in this view by the decision of the Scottish Court of Session in the case of the *Commissioners of Inland Revenue* v. *Adam* (14 Tax Cas. 34). The answer to the question raised by the petitioner should, in my opinion, be in the affirmative."

Patanjali Sastri, for the Crown.

M. Subbaraya Ayyar, for the assessee.

BEASLEY, C. J.—The question referred to us is :

" Whether the decision of the Assistant Commissioner that Rs. 11,775 is not deductible in arriving at the profits of the petitioner's business is correct in law."

The facts out of which the question referred arises are that the assessee entered into an agreement with the Secretary of

State for India in Council represented by the Revenue Divisional Officer, Gudur, on the 29th June, 1930, for the excavation of lime shells from certain Government lands in the Nellore District. Under this agreement he was to have the exclusive privilege of excavating chunam shells within the area specified in the agreement from the 1st July, 1930, to the 30th June, 1933, that is to say, for three years. He also agreed to pay the sum of Rs. 27,750 for this privilege in 12 equal quarterly instalments payable in advance.

The Income Tax Officer held that these payments were of a capital nature and were not therefore deductible in computing the income derived from the excavation and sale of lime shells and with that opinion the Commissioner of Income Tax agrees.

The agreement in question is Exhibit A and it is true that in it the assessee is described as the lessee and the documents as being a lease. One of the contentions of the assessee is that the sum paid is rent and as such is deductible. A further contention is that the Rs. 27,750 is really the purchase price of the shells lying upon and under the land which under the agreement is to be excavated.

Dealing with the latter contention first, I am clearly of the opinion that this cannot by any stretch of imagination be considered a purchase of lime shells. It might be different had the lime shells been previously excavated and heaped up in heaps upon the land. It might then have been argued that it was a purchase of so much raw material. Here the amount of shells won is entirely dependent upon the will or the efforts of the assessee. He need not, if he so desires, dig up more than a few tons of shells. On the other hand, he may be able to obtain a very large weight of them. Nor do I consider that the amount paid can be regarded in any sense as rent. The fact that it is payable by instalments does not make it so. The total amount payable is first mentioned and the payment of that total amount is merely spread over a certain time. In my view, the payment in question was not made in order to carry on an already existing business and to earn a profit out of it. The payment to be made was merely for the purpose of starting that particular venture. Any expenditure made thereafter would, of course, be deductible. But this was an initial expenditure

without which the assessee could not have begun winning the shells. I do not think that the fact that the assessee had previously entered into a number of similar agreements affects the question. It seems to me that the observations made by BOWEN, L.J., in *City of London Contract Corporation, Limited* v. *Styles* which are referred to in *Alagannan Chetty* v. *The Commissioner of Income Tax, Madras* are very much in point. In the former case the assessees took over a business of another company which had a number of unexecuted contracts on hand and the taking-over company paid a lump sum of money to the outgoing company to obtain the benefit of those contracts and claimed it as a deduction. BOWEN, L.J., said :

" You do not use it 'for the purpose of' your concern but you use it to acquire the concern."

In *Smith & Son* v. *Moore* (1921) 2 A. C. 13, LORD SUMNER says:

" They (the company) said, much as has been said in this case, that before profits can be made out of working a contract, the contract has to be got and the payment of its price is the root of the profits. The Court held that this sum was paid with the rest of the aggregate price to acquire the business and thereafter profits were made in the business; the sum was not paid as an outlay in a business already acquired, in order to carry it on and to earn a profit out of this expense of carrying it on. The same is true of the appellants. The whole price, paid in cash or in account, was a sum employed or intended to be employed as capital in the trade of the company, and therefore cannot be deducted in ascertaining profits for income tax or excess profits duty."

In that case the appellant's father carried on business as a shipping and coal agent for many years prior to his death on March 7, 1915, when the appellant acquired the business under his father's trust disposition and settlement on the terms of taking over the assets of the business at a valuation but without paying anything for goodwill. The assets included certain forward coal contracts made by the father with several colliery owners, for the delivery of coal by the latter in periodic instalments, and prices which ultimately turned out to be very

advantageous to the purchaser. These coal contracts were valued at £30,000. The appellant claimed, in arriving at the amount of the profits duty under the Finance Act 1915, to deduct this £30,000 as representing part of the purchase price of the stock-in-trade. VISCOUNT HALDANE and LORD SUMNER held that the deduction was not permissible upon the ground that it was in respect of a capital expenditure and on page 20 (of 2 A. C.) the former says:

"My Lords, in the case before us the appellant, of course, made profits with circulating capital by buying coal under the contracts he had acquired from his father's estate at the stipulated price of fourteen shillings and reselling it for more, but he was able to do this simply because he had acquired, among other assets of his business, including the goodwill, the contracts in question. It was not by selling these contracts, of limited duration though they were, it was not by parting them to other masters, but by retaining them, that he was able to employ his circulating capital in buying under them. I am accordingly of opinion that, although they may have been of short duration, they were, none the less, part of his fixed capital. That he had paid a price for them makes no difference. Indeed the description of their value of the accountants, in the words I have earlier referred to, as of doubtful validity in the hands of outsiders, emphasizes this conclusion. The £30,000 paid for the contracts or for its equivalent, therefore, became part of the appellant's fixed capital and could not properly appear in his revenue account. If that be so, then it was a sum employed as capital in his trade, and has to be excluded as a deduction from the profits on which he is assessed."

In my view, the sum in question here was a capital expenditure and therefore not a deductible item.

The question referred to us must, therefore, be answered in the affirmative. Costs of the Commissioner of Income Tax Rs. 250.

RAMESAM, J.—I agree.

SUNDARAM CHETTY, J.—I agree.

Question answered in the affirmative.

[IN THE MADRAS HIGH COURT.]

COMMISSIONER OF INCOME TAX, MADRAS

v.

Rm. Ar. Rm. ARUNACHALAM CHETTIAR & SON.

Beasley, C.J., Ramesam and Sundaram Chetty, JJ.

May 1, 1934.

INCOME TAX—LOSSES—SOLE BUSINESS AND BUSINESS IN PARTNERSHIP—PARTNER INSOLVENT—ASSESSEE LIABLE FOR ENTIRE LOSS—ASSESSEE'S RIGHT TO SET OFF SHARE OF PARTNER'S LOSS ALSO AS LOSS IN BUSINESS OR BAD DEBT—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 24.

The assessee was the sole owner of a money-lending business and the capitalist partner in a cotton business, with another person S. *The cotton business did not prosper and was closed down on the 31st March, 1930. In the partnership accounts the share of each partner in the loss was shown separately. As* S *was a man without any means, the assessee had to bear the entire loss in the cotton business. On 1st April, 1930 the debit against* S *in the partnership accounts was accordingly transferred to the assessee's money-lending accounts and in March 1931, the debt against* S *was written off as a bad debt. In calculating the taxable income of the assessee for the year ending March 1931, the assessee claimed that the amount thus written off should be set off against his income from the money-lending business:* Held, *that the assessee was not entitled to have this amount set off against his income as loss or bad debt.*

Case stated by the Commissioner of Income Tax, Madras, under Section 66 (2) of the Income Tax Act (XI of 1922), [O. P. No. 108 of 1933].

The facts of the case, appear fully in the following statement of the case made by the Commissioner:—

" The petitioner, a Nattukottai Chetti, is the manager of a Hindu undivided family residing at Devakottai in the Ramnad District within the jurisdiction of the Income Tax Officer, III Circle, Karaikudi. He carries on money-lending business in various places, among them being Devakottai (his headquarters) in the Ramnad District and Perambalur in the

Trichinopoly District. Prior to the year 1930-31, the petitioner was also a partner with a 5/8ths share in a joint trade in cotton carried on at Perambalur with one A. Somasundaram Pillai of Sattur. This business was started in the year Akshaya (1926-27). The capital necessary for the carrying on of the business was furnished by the petitioner from his money lending business at Perambalur. The cotton business did not thrive well and resulted in loss. Accounts were first settled between the partners on 31st March, 1928, and it was found that A. Somasundaram Pillai's share of the loss till that date was Rs. 9,396 and that of the petitioner, Rs. 15,660. The business was, however, continued but it incurred further loss and when accounts were again settled between the partners on 31st March, 1930, it was found that A. Somasundaram Pillai's share of the further losses sustained was Rs. 20,268 and that of the petitioner Rs. 33,780. On this date the partnership business was discontinued. A. Somasundaram Pillai's shares of loss which were debited to his account in the partnership books amounted on 31st March, 1930, with the interest thereon to Rs. 34,069. (The petitioner's share of the loss in the joint venture were set off against his other income in his assessments for 1928-29 and 1930-31, while the interest charged on the advances to the partnership, *viz.*, Rs.42,177, was included in the petitioner's assessment for 1930-31 as a part of his income from the money-lending business at Perambalur.) On 1st April, 1930, the debit against A. Somasundaram Pillai in the partnership books was transferred to the accounts of the petitioner's money-lending business at Perambalur. On 29th September, 1930, an interest of Rs. 2,569 was debited to this folio, thus bringing the total amount at debit to Rs. 36,638, and on the same date the petitioner also took a promissory note for this amount from A. Somasundaram Pillai and opened a fresh folio styled " A. Somasundaram Pillai Promissory note Account." On 28th March, 1931, the petitioner obtained from A. Somasundaram Pillai a mortgage of his house properties for Rs. 500 and on 31st March, 1931, the last day of the year of account, he wrote off the balance of Rs. 36,138.

3. In his assessment for the year 1931-32 (previous year, official year 1930-31) the petitioner claimed to deduct the above sum of Rs. 36,138 from the profits and gains of his money-lending

business at Perambalur on the ground that it represented an irrecoverable loan of this business written off during the year of account 1930-31. The Income Tax Officer considered on the facts set out in paragraph 2 above that the amount claimed to be deducted (excluding the interest of Rs. 2,569) represented the share of loss of the ex-partner in the cotton trade which came to an end on 31st March, 1930, (prior to the year of account, 1930-31), that it did not represent any loan advanced by the Perambalur money-lending business to A. Somasundaram Pillai, much less an irrecoverable loan, and that the transfer on 1st April, 1930, of the debit against A. Somasundaram Pillai from the books of the partnership to those of the petitioner's money-lending concern at Perambalur and the consequent opening of an account styled 'A. Somasundaram Pillai Promissory note Account,' were made with a view to claim this as an irrecoverable loan or bad debt pertaining to the money-lending business. He therefore held that it was an item of capital loss, that it was incurred prior to the year of account 1930-31, and that it did not relate to the petitioner's money-lending business. By excluding the interest of Rs. 2,569 debited to A. Somasundaram Pillai's account on 29th September, 1930, and credited to the Adhayam account of this business the net amount disallowed by the Income Tax Officer came to Rs. 33,569. An extract from the Income Tax Officer's order is filed, marked Exhibit A.

4. The petitioner appealed to the Assistant Commissioner unsuccessfully. An extract from the Assistant Commissioner's order is filed, marked Exhibit B.

5. The petitioner now requires me to refer to the High Court the following question: "Whether the debt of A. Somasundaram Pillai written off as an irrecoverable loan in the year of account is not liable to be deducted from the assessee's income for the year?" I am of opinion that the question as stated does not arise on the facts set out in paragraph 2 above as no loan was, as a matter of fact, advanced by the petitioner's money-lending business at Perambalur to the said A. Somasundaram Pillai. If any loan was at all made it was a loan to the partnership and as the petitioner was the financing member of that partnership, the loan or any part of it cannot be said to have become irrecoverable. The real question that arises is the

following and I accordingly refer it for the decision of the High Court:—

"Whether the ex-partner's share of the loss in the cotton trade which the petitioner had to bear by reason of the ex-partner being unable to meet his share of loss in the partnership business, can be set off against the petitioner's other income, profits or gains as a loss of profits or gains within the meaning of Section 24 of the Act."

6. The petitioner was the capitalist partner of the cotton business and A. Somasundaram Pillai was the working partner. The former contributed the entire capital required for the cotton venture. A. Somasundaram Pillai contributed no capital from which his share of the loss could be recouped by the partnership. The petitioner had therefore to meet this loss from the capital contributed by him to the partnership. I am therefore of opinion that the loss claimed to be deducted is a loss of capital and not a loss of profits or gains within the meaning of Section 24."

Patanjali Sastri, for the petitioner.

M. Subbaraya Ayyar, for the respondent.

THE CHIEF JUSTICE:—The question referred is: "Whether the ex-partner's share of the loss in the cotton trade which the petitioner had to bear by reason of the ex-partner being unable to meet his share of loss in the partnership business can be set off against the petitioner's other income, profits or gains as a loss of profits or gains within the meaning of Section 24 of the Act."

The petitioner is the sole owner of a money-lending business at Perambalur and he was the capitalist partner in partnership with one Somasundaram Pillai in a cotton business, the petitioner's share in that business being five-eighths and Somasundaram Pillai's share being three-eighths. The cotton business did not prosper and at the end of March 1930, after which it did no further business, Somasundaram Pillai was shown to be a debtor to that business in a certain sum of money, the amount of indebtedness being ascertained on the 31st March, 1930.

Subsequent to that, Somasundaram Pillai being a man of straw, the assessee became, as a partner of Somasundaram Pillai, liable to discharge the debts owing by the cotton business and this he did. The effect of this, it is contended by the assessee, was to make himself liable by reason of his taking over the indebtedness of Somasundaram Pillai for the whole of the loss sustained by the cotton business. He sought to set off against his profits and gains in the year of account of the money-lending firm the loss which he said he had sustained by reason of his having to take over the indebtedness of Somasundaram Pillai. This claim was rejected by the income tax authorities and that rejection raises the question which has been now referred to us. It, of course, is clear that where an assessee carries on more businesses than one he is entitled to set off losses sustained by him in his other business against the profits and gains made in another business, the losses, of course, arising in the same year of account as the profits and gains of the business against which the losses are sought to be set off. Another way of getting the profits of a business diminished is by getting together a number of bad debts and setting off against the profits and gains. It is, of course, clear that a bad debt is always allowed to be set off against the profits and gains of a business. Otherwise the profits of a business have not been properly ascertained. With regard to the former method of getting relief, it is quite clear that during the last year of the cotton business's life the book, *viz.*, the separate ledger folio of Somasundaram Pillai, shows that there was a loss in the firm and what Somasundaram Pillai's share of the loss was. There is nothing whatever in those books to show that that loss was the assessee's loss. His own loss is separately shown and we are told that he has been allowed to have that loss set off against the profits and gains of the money-lending business. Therefore, up to 31st March, 1930, there is nothing to show that the assessee had made any other or further loss in the cotton business than that which has been allowed in the course of his assessment. After the business is closed down by reason of the relationship between himself and Somasundaram Pillai he becomes liable for Somasundaram Pillai's indebtedness. It is claimed that there is therefore a bad debt owing by Somasundaram

Pillai to the assessee's business at Perambalur. That is a contention which cannot be upheld. There is no bad debt owing by Somasundaram Pillai to the money-lending business. The money-lending business never lent any money to Somasundaram Pillai. If it had lent moneyto Somasundaram Pillai and that had proved to be bad loan, then the assessee's money-lending business could quite rightly have claimed to set it off against the profits and gains of the money-lending business. In fact this was nothing more than a lending by the money-lending business of money to the cotton business and not to Somasundaram Pillai. What had happened since the business closed down is that Somasundaram Pillai has become a debtor of the assessee and a bad debtor of the assessee. He is not and never was a debtor of the money-lending business at Perambalur. For these reasons, the question referred to us must be answered in the negative. Costs to the Commissioner of Income Tax Rs. 250.

SIR VEPA RAMESAM, J.—I agree.

SUNDARAM CHETTY, J.—I agree.

Reference answered accordingly.

[IN THE MADRAS HIGH COURT].

COMMISSIONER OF INCOME TAX, MADRAS.

v.

P.R.A.L.M. MUTHUKARUPPAN CHETTIAR.

Beasley, C. J., Ramesam and Sundaram Chetty, JJ.

April 27, 1934

INCOME TAX—FIRM—RETIREMENT OF PARTNER—SHARE OF CAPITAL AND PROFITS PAID OUT TO RETIRING PARTNER—WHETHER CAPITAL RECEIPT OR INCOME—ASSESSABILITY--INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4 (2).

The assessee was a partner in a firm consisting of three partners. In the year 1930 he severed his connection with the firm, an account of the capital, interest thereon and profits of the firm was taken, he was paid his share of the same and he retired from the firm. It was contended on his behalf that the entire amount, thus received by him was a receipt of capital and not of income. On a reference by the Commissioner, Held: *that on the*

retirement of the assessee there was a dissolution of the partnership, the capital and profits of the business became consolidated into capital, and the share of the capital and profits received by the assessee was therefore a receipt of capital and not income, and no portion of it was liable to be assessed to income tax. Held further, *that the fact that the other partners continued to carry on the business was immaterial, inasmuch as in the eye of the law, the old firm had ceased to exist on the retirement of the assessee.*

COMMISSIONER OF INCOME TAX, MADRAS v. SIDDHA GOWDER & SONS (I.L.R. 55 Mad. 518) followed.

Cases referred to :

ARUNACHALAM CHETTIAR v. COMMISSIONER OF INCOME TAX, MADRAS [1924] (I.L.R. 47 Mad. 660 ; 77 I.C. 772 ; 46 M.L.J. 68 ; A.I.R. 1924 Mad. 474).

COMMISSIONER OF INCOME TAX, MADRAS v. SIDDHA GOWDER & SONS [1932] (I.L.R. 55 Mad. 818 ; 137 I.C. 689 ; 62 M.L.J. 638 ; A.I.R. 1932 Mad. 375).

INLAND REVENUE COMMISSIONERS v. BURRELL [1924] (93 L.J.K.B. 709 ; (1924) 2 K.B. 52 ; 9 Tax Cas. 27 ; 131 L.T. 727 ; 40 T.L.R. 562).

Case stated by the Commissioner of Income Tax, Madras, under Section 66 (2) of the Indian Income Tax Act, XI of 1922. (O.P. No. 264 of 1932).

The facts are stated in full in the following statement of the case made by the Commissioner :—

"The petitioner is a Nattukottai Chetty, money-lender, carrying on business at Paganeri, his head-quarters in British India, and in various other places both within and without British India either on his own account or in partnership with others. He is assessed on the income derived by him from his business at head-quarters on his share of the profits of the several partnership businesses in British India and on such of the profits of the businesses outside British India as are remitted to him in British India.

Among the several businesses in which the petitioner was a partner with S. P. K. A. Ramanathan Chettiar of Sholapuram, "S. P. K. A. A. M.," Colombo, was one. This firm consisted of three partners and the petitioner had a 6¼ anna

share therein. On 31st May, 1930, the petitioner severed his connection with this firm; an account was taken of the amounts due to the petitioner by way of capital, surplus capital, share of profit and interest thereon and a sum of Rs. 2,09,670 was found due to him as follows:—

	Rs.
(1) Amount due by way of capital, surplus capital and interest thereon (*viz.*, Rs. 38,305) till 31st May, 1930	1,86,170
(2) Share of profits from 26th October, 1926 to 31st May, 1930	23,500
	2,09,670

This was repaid as follows:—

(1) By transfer to the petitioner of the debt due by the A. L. T. S. M. Firm, Rangoon, to the S. P. K. A. A. M. Firm, Colombo, with interest as on 1st June, 1930	1,10,612
(2) By transfer to the petitioner of the debt due by N. M. A. L. M., Devakottah to the S.P.K.A.A.M. Firm, Colombo as on 1st June, 1930	11,009
(3) By hundi drawn by S. P. K. A. Ramanathan Chettiar in favour of the petitioner in Colombo	64,549
(4) By hundi drawn by S. P. K. A. Ramanathan Chettiar in favour of the petitioner in Colombo, for share of profit	23,500
Total Rs.	2,09,670

The A. L. T. S. M. Firm, Rangoon executed on 24th June, 1930, a promissory note in favour of the petitioner for the debt of Rs. 1,10,612 transferred from the Colombo S. P. K. A. A. M. Firm to the petitioner. The two hundies above referred to were cashed at Colombo and the amount realised, *viz.*, Rs. 88,915 including interest from 1st June, 1930, till date of encashment (Rs. 735 plus Rs. 231 or Rs. 866) was remitted by the petitioner to his business in Singapore. After petitioner's severance

from the S.P.K.A.A.M. Firm, Colombo, the other two partners of this firm are continuing the same business under the style "S.P.K.A.," Colombo. The petitioner did not carry on any business at Colombo after the severance of his connection with the Colombo firm.

4. In the assessment of the petitioner for the year 1931 32 (previous year Tamil year Pramodutha, 13th April, 1930 to 12th April, 1931) the Income Tax Officer, Sivaganga (who is the assessing officer in this case) considered that the transfer to the petitioner on 1st June, 1930, of the debt due to S.P.K.A.A.M. Firm, Colombo, from the A.L T.S.M. Firm, Rangoon and the taking of a promissory note by the petitioner in British India from the latter firm in acknowledgement of the debt was in effect a receipt by the petitioner in British India of his Colombo-moneys, and as the petitioner had to his credit in the Colombo firm profits to the extent of Rs. 62,671 (including the interest on the hundies Rs. 866) assessable on remittance under Section 4 (2) of the Act, the Income Tax Officer considered that the amount involved in the transfer to the extent of the profits available was a remittance of profit received in or brought into British India on the date of such transfer. The Income Tax Officer therefore included the sum of Rs. 62,671 in the assessment of the petitioner.

5. The petitioner appealed to the Assistant Commissioner and contended amongst other things:

(1) That though his profits, to the extent of Rs. 62,671, had laid in deposit with the S.P.K.A.A.M. Firm, Colombo, these profits had become capital on the severance of his connection with that firm on 31st May, 1930 and that therefore the sum of Rs. 62,671 was a remittance out of the capital assets that fell to his portion on the dissolution of that firm, and

(2) that at any rate out of the profit of Rs 62,671, Rs. 24,366 (Rs. 23,500 being the amount covered by the hundi drawn specifically towards petitioner's share of profits and Rs. 866 the interest on the two hundies cashed in Colombo) should be excluded from the assessment.

The Assistant Commissioner conceded the petitioner's claim in contention (2) above and excluded from the assessment

the sum of Rs. 24,366 thereby reducing the amount of the remittance taxed to Rs. 38,305. But he overruled contention (1) above for the reasons set out in his order, a copy of which is filed marked Exhibit A.

6. The petitioner now requires me to refer to the High Court certain questions alleged to be questions of law arising out of the Assistant Commissioner's order. I consider that the only question of law arising in this case is the following and I refer it accordingly for the decision of the Court.

Question.—Whether on the facts of this case the sum of Rs. 38,305 is a receipt of capital or of profit assessable under Section 4 (2) of the Act.

7. The petitioner's case is that the profits received by him when he severed his connection with S.P.K.A.A.M. Firm, Colombo, had lost their character of profits, and had become capital, by reason of the dissolution of the Firm. He bases his contention on the decision in *Commissioners of Inland Revenue* v. *Burrell* [(1924) 9 T.C. 27] where it was held that whatever is given to the shareholder of a company on its liquidation is capital and not profit. The profits under consideration in that case were those of a company. I venture to doubt whether the principle of that decision can be applied to the case of a partnership, which is not a corporate body. But even if it can, the facts relating to the partnership in the present case are not such as to create an analogy with *Burrell's* case. There was no stoppage of business or final dissolution of partnership, accompanied by a distribution of assets. All that happened was a change in the constitution of the partnership, one partner going out and taking his profits with him, and the business continuing in the hands of the other partners. The profits remaining with the firm and standing in the firm's books to the credit of the other partner certainly did not become capital by reason of this change. I see no ground therefore for supposing that the profits of the outgoing partner become capital.

In my opinion therefore, the answer to the question is that the sum of Rs. 38,305 was an item of profit liable to tax."

K. Rajah Ayyar and *V. Ramaswami Ayyar*, for the assessee.

M. Patanjali Sastri, for the Commissioner of Income Tax.

BEASLEY, J.—The question referred to us is whether on the facts of this case the sum of Rs. 38,305 is a receipt of capital or of profit assessable under Section 4 (2) of the Indian Income Tax Act. The petitioner was a partner in the S. P. K. A. A. M. Firm in Colombo. He retired from that firm; and an account was taken of the capital and of the profits etc., and the petitioner was given his share and he went out of the firm with it. His contention is that his retirement from the firm brought about a dissolution of the firm and that on such a dissolution the profits and capital etc., of the firm became consolidated into capital for distribution amongst the partners. He therefore contends that the sum in question cannot be assessed to income-tax as profits following the decision in *Commissioner of Income Tax, Madras* v. *Siddha Gowder & Sons* in which the decision in *Inland Revenue Commissioners* v. *Burrell* was applied. The Commissioner of Income Tax contests this position and contends that the principle of the latter decision cannot be applied to the case of a partnership which is not a corporate body. That argument, of course, proceeds to the length of saying that the decision in *Commissioner of Income Tax* v. *Siddha Gowder & Sons* was incorrect. I may here observe, however, that in that case it was put in the forefront of the Income Tax Commissioner's case that the principle laid down in *Burrell's* case should be extended to the case of a partnership in India; and if the facts of this case are similar to the facts in that case, then, as I see no reason for thinking that case was incorrectly decided, it must be applied. He seeks also to distinguish this case from that because he says that there was no stoppage of business or final dissolution of partnership accompanied by a distribution of assets. This view completely ignores the provisions of Section 253 (7) of the Indian Contract Act which provides that, in the absence of any contract to the contrary, if from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members. The legal position therefore, is that upon the retirement of the petitioner from the partnership the partnership was dissolved as between all the other members. It follows therefore that there must be deemed to have been an ascertainment of the shares of all the partners—and indeed there

certainly was one with regard to the petitioner—and distribution of the partnership assets. It does not in the least degree in my opinion affect the question that the other partners continued in business together. Their doing so was merely in the capacity of partners in a new firm, the legal position clearly being that the old firm had ceased to exist. This case is not at all similar to another case relied upon by the Commissioner of Income Tax *viz.*, *Arunachalam Chettiar* v. *Commissioner of Income Tax*, *Madras*. There what was being considered was a partition of a Hindu joint family. In my view, totally different considerations apply to such as that. For the reasons I have already stated, the answer to the question referred must be that upon the facts of this case the sum of Rs. 38,305 is a receipt of capital and not of profits. The assessee will be allowed Rs. 250 costs.

RAMESAM, J.—I agree.

SUNDARAM CHETTY, J.—I agree.

Reference answered accordingly.

[IN THE ALLAHABAD HIGH COURT.]

GURMUKH RAI

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.

SULAIMAN, C.J. and BAJPAI, J.

May 4, 1934.

INCOME TAX—REFERENCE—ORDER DECLINING TO REQUIRE COMMISSIONER TO STATE CASE—APPEAL TO PRIVY COUNCIL—MAINTAINABILITY—INCOME TAX ACT, (XI OF 1922), SECTIONS 66 (3) AND 66-A (2).

An order passed by a High Court declining to call upon the Commissioner to State a case and refer it, is not a judgment 'on a reference' within the meaning of Section 66-A, sub-Section (2) of the Income Tax Act, and the High Court has no power to grant a certificate for leave to appeal to the Privy Council from such an order. But in view of the provisions of sub-Sections 5 (a) of the said section the aggrieved party may apply to the Privy Council for special leave.

Cases referred to:

DELHI CLOTH AND GENERAL MILLS CO., LTD. *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1927] (I.L.R. 9 Lah. 284).

E. M. CHETTIYAR FIRM v. COMMISSIONER OF INCOME TAX, BURMA [1930] (I. L. R. 8 Rang. 435).

FEROZE SHAH v. COMMISSIONER OF INCOME TAX, PUNJAB [1933] (1933 I. T. R. 219 ; I. L. R. 14 Lah. 682).

TATA IRON AND STEEL CO., LTD. v. CHIEF REVENUE AUTHORITY [1923] (I. L. R. 47 Bom. 724: 74 I. C. 469).

Application for leave to appeal to the Privy Council [P. C. Appeal No. 7 of 1934].

Muhammad Ismail, Government Advocate, and *K. Masud Hasan*, for the applicant.

K. Verma, for the opposite party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council from an order of the High Court dated 8th December, 1933, dismissing an application filed by the applicant under Section 66, sub-Section (3), of the Indian Income Tax Act praying that the Commissioner be required to state the case and to refer it to the High Court. It appears that the applicant had applied to the Commissioner of Income Tax to review the proceedings under Section 33 of the Income Tax Act and praying that if he did not feel inclined to interfere with the previous order, he might refer to the High Court the question of law raised in the application; but the Commissioner passed an order dated 23rd January, 1933, refusing to interfere and declined to refer the case.

A preliminary objection is taken that an appeal does not at all lie. We are of opinion that this objection has force.

Under Clause 30 of the Letters Patent of this High Court a right of appeal was given to the Privy Council in certain circumstances. But Clause 35 expressly provided that the provisions of the Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council. The provisions of Clause 30 must, therefore, be deemed to have been superseded by similar provisions contained in Sections 109 and 110 of the Code of Civil Procedure. Under Section 109, an appeal lies from any decree or order when certified to be a fit case for appeal subject to the condition laid down in Section 110. It was, therefore, necessary under the Code that there must be

either a decree or final order or a decree or order certified to have been passed in a case fit for appeal.

In the case of *Tata Iron & Steel Co., Ltd.* v. *The Chief Revenue Authority, Bombay* their Lordships of the Privy Council laid down that the decision of a High Court upon a case stated and referred to the Court by the Chief Revenue Authority under Section 51 of the Indian Income Tax Act, 1918, was merely advisory, and, therefore not a final judgment, decree, or order within the meaning of Clause 30 of the Letters Patent. The opinion expressed by the High Court on such reference was stated to be only advisory made by the Court in the exercise of its consultative jurisdiction. The result was that no appeal could lie to their Lordships of the Privy Council from the opinion expressed by the High Court on a reference.

By the Indian Income Tax Amendment Act of 1926, Section 66 A was specially added to Section 66 which among other matters contained a provision that an appeal shall lie to His Majesty from any judgment of the High Court delivered on a reference under Section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

In the case of *Delhi Cloth and General Mills Co., Ltd., Delhi* v. *The Income Tax Commissioner, Delhi* their Lordships of the Privy Council laid down that the right of appeal given by the new section was confined to a case which the High Court certifies to be a fit one for appeal to His Majesty in Council, and that the fact that these words were textually the same as the concluding words of Section 109 (*c*) of the Code of Civil Procedure coupled with the carefully limited referential words to the Code of Civil Procedure in sub-Section (3) suffice, in their Lordship's judgment to exclude from any right of appeal cases which fall within the requirements of Section 110 of the Code and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. Their Lordships did not agree with the contention that the reference to the Code of Civil Procedure was made in terms sufficiently comprehensive to include within the class of appealable cases all that are defined in the provisions incorporated by reference. The words of qualification, "so far as may be" in sub-Section (3) are apt to confine the statutory right of appeal to

the cases described in sub-Section (2) of Section 66-A of the Income Tax Act. It is clear therefore, that the provisions under the Code of Civil Procedure conferring a right of appeal must now be deemed to have been superseded by those contained in Section 66-A.

No doubt, in the case of *Feroze Shah* v. *The Income Tax Commissioner*, *Punjab and N. W. F. Province*, *Lahore* their Lordships on an appeal from the High Court refusing to require the Commissioner to state the case, went into the merits of the case, but their Lordships took care to state that as the appeal failed on the merits it became unnecessary for their Lordships to deal with the objection to its competence which was considered to be a serious one. That case, therefore, cannot be taken to be an authority for the contention that an appeal lies.

Examining the words of Section 66-A (2) it is quite clear that the right of appeal is restricted to cases of appeals from any judgment of the High Court delivered on a reference made under Section 66, in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council. Before the case can be certified to be a fit one for appeal it is necessary that there must be a judgment of the High Court delivered on a reference made under Section 66. Now, under sub-Sections (1) and (2) of Section 66, the High Court has to deliver a judgment on the reference made to it. But so far as sub-Section (3) is concerned, the High Court, if not satisfied with the correctness of the Commissioner's decision, can only require the Commissioner to state the case and to refer to it. There is, therefore, no reference to the High Court so long as the Commissioner has not stated the case and referred it when required by the High Court. The stage of a reference accordingly does not arrive at all when the High Court declines to require the Commissioner to state the case and refer it. We must, therefore, hold that the order passed by the High Court declining to call upon the Commissioner to state the case and refer it, was not a judgment at all "on a reference" within the meaning of Section 66-A, sub-Section (2), so as to allow a right of appeal to His Majesty in Council. There is no other provision under which an appeal would lie. We are fortified in this view by the judgment of the learned

Chief Justice of the Rangoon High Court in *E. M. Chettiar Firm* v. *The Commissioner of Income Tax* with whose conclusion we agree.

The dismissal of this application will, of course, in no way debar the applicant from applying to their Lordships of the Privy Council for special leave, as Section 66-A, sub-Section (5) specially preserves the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise, howsoever.

The learned Advocate for the respondent urges before us that even if an appeal had lain, the present applicant would be barred by time because it was filed more than 90 days from December 8, 1933.

The learned Advocate for the applicant urges that he is entitled to extension of time. His contention is that the time requisite for obtaining a copy of the order should be excluded under Section 12, sub-Section (2) of the Indian Limitation Act.

It appears that the applicant applied for a copy of the judgment on February 28, 1934, and obtained it on March 8, 1934. The formal order prepared by this Court's Office was ready on February 28, 1934. The applicant's counsel applied for copies of both the judgment and the decree. The copy of the judgment was delivered to him on March 8, 1934, and the copy of the decree on March 22, 1934, as shown by the High Court register. The applicant however, has produced only the copy of the judgment and not the copy of the decree. Under Section 12, sub-Section (2), of the Limitation Act the applicant is entitled to the exclusion of the time requisite for obtaining a copy of the decree or order appealed from, but not of the whole time requisite for obtaining the copy of the judgment that was pronounced. Although there is a defect, we are satisfied that the time elapsed between the application for the copy of the decree and the date when the copy was given to him, if excluded, would make the present application within time.

We accordingly dismiss the application with costs on the ground that no appeal lies, and we assess the costs of the Crown Counsel at Rs. 150. The necessary certificate of fee should be filed within one month.

Application dismissed.

[IN THE RANGOON HIGH COURT.]

COMMISSIONER OF INCOME TAX, BURMA

v.

P. L. S. M. CONCERN, MINHLA.

PAGE, C. J., BAGULEY AND BA U, JJ.

July 3, 1934.

INCOME TAX—MONEY-LENDING BUSINESS—PURCHASE OF DEBTOR'S PROPERTY IN SATISFACTION OF DEBT—ASSESSMENT OF PROFITS—GUIDING PRINCIPLES—ASSESSEE'S RIGHT TO CLAIM LOSS ON REVALUATION OF LAND—APPROPRIATION OF DEBTS—INCOME TAX ACT (XI OF 1922), SECTION 13.

Where the assessees, a firm carrying on money lending business, were compelled to take over lands in liquidation of the debts due to them in respect of loans that they had advanced to certain cultivators and a reference was made to the High Court on the question whether the assessees were entitled, for the purpose of income tax assessment, to claim a loss by revaluing the lands thus taken over and if so, whether the re-valuation must be confined to lands taken over in the accounting year :

Held, (*i*) *that the amount of the debt in satisfaction of which the lands are transferred is not a criterion of the value of the lands taken over, but in each case the income tax authorities must make an estimate of the real value, in the accounting year, of the lands transferred unless the lands have been sold by the assessee during the accounting year*; (*ii*) *that in making an estimate of the value while the assessees are not bound by the figure at which the lands are entered in their account books, the income tax authorities are also not bound to accept the assessee's estimate of the value*; (*iii*) *that, if the estimated value of the lands in the accounting year was greater than the principal sum that was lent, the income tax authorities would be entitled to treat the balance, after deducting an amount equivalent to the loan, as representing profits and gains accruing from the transaction and to assess the same as income chargeable with income tax. On the contrary, if the estimated value of the lands was less than the amount of the principal sum that had been lent, no tax would be chargeable in*

the accounting year in which the lands were transferred, although it may be that the estimated value of the lands in that year exceeds the amount due to the assessees in respect of interest on the loan; (*iv*) *that inasmuch, however, as the assessment of the land, unless it was sold by the assessees in the accounting year, would be based upon what must necessarily be a mere estimate of the lands, it would be fair and reasonable that an adjustment of the assessment should be made in the accounting year in which the assessees sell the lands, when it would be possible finally to ascertain whether or not in respect of the transaction a profit chargeable to income tax had accrued to the assessees* : (*v*) *that as the assessment is made upon the footing that the transaction has been completed during the accounting year, the assessees would not be entitled to have the value of the lands reassessed in any other accounting year except that in which the lands are sold by them, and until the sale takes place the final adjustment of the assessment must necessarily remain in suspense.*

Held further, *that the revaluation must be confined to the lands taken over in the accounting year.*

Cases referred to:

AURANGABAD MILLS, LTD., *In re* [1921] (64 I.C. 9; 45 Bom. 1286; A.I.R. 1921 Bom. 159; 1 I.T.C. 116.)

COMMISSIONER OF INCOME TAX, BIHAR & ORISSA *v.* MAHARAJADHIRAJA OF DHARBANGA [1933] (A.I.R. 1933 P.C. 108; 142 I.C. 437; 12 Pat. 318; 1933 I.T.R. 94).

COMMISSIONER OF INCOME TAX, CENTRAL PROVINCES AND BERAR *v.* S. M. CHITNAVIS [1932] (59 I.A. 290; 28 N.L.R. 205; 1932 P. C. 178; 137 I.C. 772; 1932 Comp. Cas. 464.)

COMMISSIONER OF INCOME TAX, BOMBAY *v.* AHMEDABAD NEW COTTON MILLS CO., LTD., [1930] (54 Bom. 312; A.I.R. 1930 P.C. 56; 121 I.C. 543; 57 I.A. 21.)

COMMISSIONER OF INCOME TAX, MADRAS *v.* CHENGALVARAYA CHETTY [1925] (91 I.C. 137; 48 Mad. 836; A.I.R. 1925 Mad. 1242; 1 I.T.C. 390.)

COMMISSIONER OF INCOME TAX, MADRAS *v.* SUBRAMANIAM CHETTYAR [1927] (50 Mad. 765; A.I.R. 1927 Mad. 841; 104 I.C. 56.)

COMMISSIONER OF TAXES *v*. MELBOURNE TRUST, LTD. [1914] (1914 A.C. 1001; 84 L. J. P. C. 21; 30 T. L. R. 685; 111 L.T. 1040).

EDWARD COLLINS & SONS, LTD. *v*. COMMISSIONERS OF INLAND REVENUE [1928] (12 Tax Cas. 382).

GRESHAM LIFE ASSURANCE SOCIETY LTD. *v*. BISHOP [1902] (1902 A.C. 287; 71 L.J.K.B. 618; 18 T.L.R. 626; 4 Tax Cas. 464; 86 L.T. 693; 66 J.P. 755).

J. P. HALL & CO., LTD. *v*. COMMISSIONERS OF INLAND REVENUE [1928] (12 Tax Cas. 382).

RAGHUNANDAN PRASAD *v*. COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA [1933] (60 I.A. 133; 12 Pat. 305; 142 I.C. 446; 1933 I.T.R. 113).

SMITH *v*. LAW GUARANTEE AND TRUST SOCIETY, LTD. [1904] (2 Ch. 569; 73 L.J. Ch. 733; 91 L.T. 545; 12 Man. 66).

STANDARD LIFE ASSURANCE CO. *v*. ALLAN [1902] (4 Tax Cas. 447).

SUN INSURANCE OFFICE *v*. CLARK [1912] (6 Tax Cas. 59).

VENKATADRI APPA RAO *v*. PARTHASARATHI APPA RAO [1922] (48 I.A. 150; 44 Mad. 570; A. I. R. 1922 P.C. 233).

WHIMSTER & CO. *v*. COMMISSIONERS OF INLAND REVENUE [1928] (12 Tax Cas. 813).

YOUNG & CO., J. H. *v*. COMMISSIONERS OF INLAND REVENUE [1928] (12 Tax Cas. 827).

Case stated by the Commissioner of Income Tax, Burma under Section 66 (2) of the Income Tax Act, XI of 1922 [Civil Ref. No. 2 of 1934].

Govt. Advocate, for the Commissioner of Income Tax.

Bose, *De* and *Basu*, for the assessees.

PAGE, C.J.—The question propounded is "whether in the circumstances of this case the assessee is entitled for the purposes of his income tax assessment to claim a loss by revaluing lands taken over in the course of his money-lending business: and if any so, whether the revaluation must be confined to lands taken over in the accounting year." The material section of the Income Tax Act, is Section 13, which runs as follows:

"Income, profits and gains shall be computed for the purposes of Sections 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee:

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income Tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income Tax Officer may determine."

Now, as I understand the law upon this subject the intention of the legislature in enacting Section 13 was that for income tax purposes the assessee should be entitled to make use of any method of accounting that he chooses to adopt, but (*a*) he must follow the selected method " regularly," and is not to be allowed to change his system of book-keeping from year to year or so frequently as to prevent a fair estimate of his income, profits and gains *de anno in annum* from being ascertained; (*b*) " if the method employed is such that in the opinion of the Income Tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income Tax Officer may determine "; (*c*) " what the officer is directed to compute is not the assessee's receipts, but the assessee's income, and *in dubio* what the assessee himself chooses to treat as income may well be taken to be income and to arise when he so chooses to treat it "; although book entries purporting to relate to the receipt of income are not necessarily conclusive as to the *quantum* of the income to which they purport to refer, for the real income, profits and gains that have accrued during each accounting year are in every case to be determined by the Income Tax Officer as a matter of fact, and (*d*) " what are chargeable to income tax in respect of a business are the profits and gains of a year; and in assessing the amount of the profits and gains of a year account must necessarily be taken of all losses incurred, otherwise you would not arrive at the true profits and gains."

But the losses must be losses incurred in that year. You may not, when setting out to ascertain the profits and gains of one year, deduct a loss which had in fact been incurred before the commencement of that year. If you did, you would not arrive at the true profits and gains of the year. For the purpose of computing yearly profits and gains each year is a separate self-contained period of time, in regard to which profits earned or

losses sustained before its commencement are irrelevant: *Gresham Life Assurance Society Ltd.* v. *Bishop*; *Standard Life Assurance Co.* v. *Allan*; *Commissioner of Taxes* v. *Melbourne Trust, Ltd.*; *Aurangabad Mills, Ltd.* In re; *Venkatadri Appa Rao* v. *Parthasarthi Appa Rao*; *Commissioner of Income Tax, Madras* v. *Chengalvaraya Chetty*; *Commissioner of Income Tax, Madras* v. *Subramaniam Chettiar*; *Commissioner of Income Tax, Bombay* v. *Ahmedabad New Cotton Mills Co., Ltd.*; *Commissioner of Income Tax, Central Provinces and Berar* v. *S. M. Chitnavis*; *Raghunandan Prasad* v. *Commissioner of Income Tax, Bihar & Orissa*; *Commissioner of Income Tax, Bihar & Orissa* v. *Maharajadhiraj of Darbhangha*; *Sun Insurance Office* v. *Clark*; *J. P. Hall & Co., Ltd.* v. *Commissioners of Inland Revenue*; *Edward Collins & Sons Ltd.* v. *Commissioner of Inland Revenue*; *Whimster & Co.* v. *Commissioners of Inland Revenue*; *and J. H. Young & Co.* v. *Commissioners of Inland Revenue.*

Now, bearing in mind the above rules it is necessary to consider the facts of the particular case under reference. The assessee, who are a firm of Chettyar money-lenders carrying on business at Minhla and Sitkwin like many other money lenders in Burma, have been compelled to take over lands, and other immovable property in liquidation of the debts due to them in respect of loans that they have made to cultivators. But it is to be remembered that the assessees are money-lenders, not land owners, and that their business is to lend money at interest and not to cultivate the soil.

I assume for the purpose in hand that prior to the assessment for 1932-33 the assessees were content to have their income assessed in respect of transactions in which lands had been taken over in satisfaction of outstanding loans in the following manner; the value of the land was set out in their books of account at a certain figure which was allocated in part to the principal sum that had been lent and in part to interest. Upon the amount appropriated to interest income tax was claimed and paid in the year in which the lands were transferred but the question whether income tax was payable in respect of the receipt of the land to the extent to which the value thereof represented a repayment of the principal was held in suspense until the land was sold and it had been ascertained whether the

sale proceeds exceeded or were less than the amount of the principal sum that had been lent. For the purpose of the assessment for the year 1932-33, however, the assessees in respect of lands transferred to them during the accounting year in liquidation of outstanding loans claim the right to initiate a new method of accounting. They contend, in my opinion, rightly, that the amount of the debt in satisfaction of which the land is transferred is not a criterion of the value of the lands taken over, as the extent to which the lands are to be treated as liquidating the debt is a matter of adjustment between the creditor and the debtor, in many instances the lands being taken in satisfaction of the debt as a whole not because the value of the land was in any sense the equivalent of the value of the debt, but merely because the debtor had no other property and there was no prospect of the debtor being in a position otherwise to liquidate the amount that he owed to the assessees. In the accounting year about sixty such transactions were carried through by the assessees. Now, of course, it is well settled that normally :—

" Where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between capital and interest by either debtor or creditor the presumption is that the payment is attributable in the first instance towards the outstanding interest: *Venkatadri Appa Rao v. Parthasarthi Appa Rao.* This presumption is no doubt operative primarily in questions between debtor and creditor but in their Lordships' view, the Income Tax Officer, finding that the assessee received a payment from his debtor of Rs. 2,78,000 in the year Fasli 1332 and that the assessee had not up till then credited himself as having received any interest or disclosed or accounted for any interest receipts to the revenue authorities was entitled in the circumstances to treat this sum of Rs. 2,78,000 as applicable to the outstanding interest to the extent of Rs. 2,71,000 and accordingly to treat the payment to that extent as income of the assessee in the year of payment " : per LORD MACMILLAN in *Commissioner of Income Tax, Bihar and Orissa* v. *Maharajadhiraj of Darbhanga.*

For the purpose therefore it matters not in the present case whether the assessees in fact did or did not appropriate any part of the value of the lands received during the accounting year

towards the payment of interest, the result in law in either case would be the same. But, as LORD MACMILLAN proceeded to point out, a transaction where there is "no settlement, but merely an open payment to account" differs *toto cælo* from:

> "an arrangement affecting the whole indebtedness whereby certain assets were accepted in part satisfaction and promissory notes were taken for the balance. The basis of the presumption, namely, that it is to the creditor's advantage to attribute payments to interest in the first place, leaving the interest bearing capital outstanding is gone. Moreover........there is authority for the proposition that in a question with the revenue taxpayer is entitled to appropriate payments as between capital and interest in the manner least disadvantageous to himself: *Smith* v. *Law Guarantee and Trust Society Ltd.*"

Now, in these circumstances the assessees contend that each transaction in which land is received in satisfaction of an outstanding debt must be considered on its own merits. It is urged on their behalf that the land which is received in repayment of a loan is the equivalent of cash, and should be treated as money's worth and as such not fixed capital, but working assets, and part of the stock in trade of their business as money-lenders. They contend that in cases where the value of the land taken over is less than the amount of the principal sum that is payable no profit has accrued from the transaction, and no income-tax is chargeable, in respect thereof; although it may be as between the assessees and the debtor that the land was accepted in satisfaction of both the principal and the interest due on the loan. Take the following illustration. Suppose the amount of the principal sum lent was Rs. 50,000 and that during the accounting year land of the value of Rs. 30,000 is transferred to the creditor in satisfaction of the principal sum of Rs. 50,000 and also of Rs. 10,000 for interest due thereon. The assessees in such a case would contend that although the amount of the interest set out in their books as liquidated by the transfer of the land was less than the value of the land no income-tax would be payable thereon because in respect of the transaction as a whole a loss had accrued of Rs. 20,000. In my opinion, the contention of the assessees

ought to be accepted. The Commissioner of Income Tax in the case that he stated observed that:

"If the assessee tries to raise the question of fact as to the actual value of these lands I would say that he is bound by the figure at which he took over the lands and entered them in his accounts. He cannot say that they were worthless then, since the debtors would not part with them for less. If he had bought them in at an auction sale the department would not question the price (unless there was some trickery), even though it was lower than the prevailing market prices. And, if the assessee had taken over the lands for much less than the amount due to him, the department would not refuse to allow the loss. But once he has taken over the lands at a valuation, he is bound by that valuation until he finally disposes of the lands: see *Commissioner of Taxes* v. *Melbourne Trust Ltd.*"

No doubt the value of the land as set out in the assessees' books of account may be treated as *prima facie* evidence of its true value, and an assessee normally would have no cause for complaint if the income-tax authorities accepted for income-tax purposes the value which the assessee himself had put upon his assets in his books of account. But in every case it is incumbent upon the Income Tax Officer to ascertain as a matter of fact what are the real profits and gains of the business in the accounting year and, as LORD LOREBURN pointed out in *Sun Insurance Office* v. *Clark*:

"A rule of thumb may be very desirable, but cannot be substituted for the only rule of law that I know of, namely, that the true gains are to be ascertained as nearly as it can be done."

The error, if I may say so, into which as it seems to me the income-tax authorities have fallen in the present case is that they appear to think that whereas for the purpose of ascertaining as a matter of fact the actual profits and gains that accrued during the accounting year the income-tax authorities have a free hand, an assessee is precluded by his book entries from proving what the true position is, and that for the purpose of assessment the Income Tax Officer is entitled—applying as it were a rule of thumb—to take as the actual value of the lands, the figure at which the lands are entered in the assessees' books, notwithstanding that the value at which the lands stand in the assessees' books (in the circumstances in which

it is well known that Chettyar money-lenders are compelled to take over lands from their debtors), may be merely an arbitrary and fictitious figure, and that the assessees may be in a position to prove that the figure at which the lands have been valued in their books of account bears no relation to the real value of the lands that have been transferred in satisfaction of the debt.

The problem to be solved however, is whether in truth and in fact the several loan transactions which were completed in the accounting year by the transfer to the assessees of land in liquidation of the debts resulted in a profit or a loss to the assessees. Of course, unless the lands are sold by the assessees in the accounting year it necessarily follows that the actual value of the lands cannot be ascertained and an estimate of their value must be made. But as LORD LOREBURN observed in *Sun Insurance Office* v. *Clark*:

"there is no way of estimating which is right or wrong in itself. It is a question of fact and figures whether the way of making the estimate in any case is the best way for that case;"

and while I am of opinion that in the present case the assessees ought not to be held bound in submitting an estimate of the value of the lands by the figure at which the lands were entered in their books of account, I am also of opinion, that the Income Tax Officer is not bound to accept the assessee's figure and is free to fix his own estimate of the value in the accounting year of the lands that have been transferred to the best of his ability.

It follows that if the estimated value of the lands in the accounting year is greater than the principal sum that was lent, the income tax authorities will be entitled to treat the balance, after deducting an amount equivalent to the loan, as representing profits and gains accruing from the transaction, and to assess the same as income chargeable with income tax. *E contra* if the estimated value of the lands is less than the amount of the principal sum that has been lent no tax will be chargeable in the accounting year in which the lands are transferred, although it may be that the estimated value of the lands in that year exceeds the amount due to the assessees in respect of interest on the loan. Inasmuch, however, as the assessment of the land, unless it is sold by the assessees in the accounting year, will be based upon what must *ex necessitate rei* be a mere estimate of the lands, in my

opinion, it is fair and reasonable that an adjustment of the assessment should be made in the accounting year in which the assessees sell the lands, when it will be possible finally to ascertain whether or not in respect of the transaction a profit chargeable to income tax has accrued to the assessees. As the assessment is made upon the footing that the transaction has been completed during the accounting year, I am of opinion that the assessees are not entitled to have the value of the lands assessed in any other accounting year except that in which the lands are sold by them, and until the sale takes place the final adjustment of the assessment must necessarily remain in suspense. I would answer the first part of the question propounded in the above sense, and the second part in the affirmative. The assessees are entitled to their costs, 10 gold mohurs, which includes the Rs. 100 deposited under Section 66 (2).

BAGULEY, J.—I agree and have very little to add. With regard to the fact that the assessee entered the land in his accounts at a certain figure, I would point out that the assessee merely put down in his cash account a certain figure as representing the land which he received as money's worth, but on the other side of the account he immediately wrote the land out again as transferred to a land account, so that as far as the cash account is concerned he might have put down any figure between one rupee and one crore of rupees. The two entries cancelled, and that was the end of the land so far as the accounts were concerned. It is not as though he had entered the acquisition of the land as equivalent to the receipt of a certain amount of money in a profit-and-loss account, or as though he had done anything else of that nature in which he definitely recognised the land as being the equivalent of a certain amount of money for purposes of calculating his profits.

With reference to the remark made by the Commissioner of Income Tax " he cannot say that they were worth less since the debtors would not part with them for less." it may be pointed out that what has got to be ascertained as nearly as possible, and as a matter of fact, is the real value of the land at the close of the year of account. The value of any article is the price which it might be expected to fetch in an open market as between a willing buyer and a willing seller. Its value is not

what its owners when in a strong position can extort, possibly nominally only, from a buyer who, if he will not agree to buy at that figure, may incur other outside expenses. It is common knowledge that in cases of this nature the so-called "sale" by a debtor to his creditor of land with a view to cancelling his debt is simply a way in which the land and the debt are set off against each other, and the original debt is cancelled on the basis that the debtor shall be under no further liability whatsoever to the creditor with regard to this transaction. The debtor, in these circumstances, particularly an ordinary cultivator, considers that the safest way to make quite sure that he can be under no further liability is to insist upon a nominal purchase price being entered in the sale-deed, which is equal to the total amount which he is liable to pay, to put an end to his liability on the mortgage debt.

BA U, J.—I agree.

Reference answered.

[IN THE MADRAS HIGH COURT.]

COMMISSIONER OF INCOME TAX, MADRAS

v.

MADHWA SIDDHANTHA ONNAHINI NIDHI LTD.

Beasley, C. J., Ramesam and Sundaram Chetty, JJ.

May 4, 1934.

INCOME TAX—MUTUAL BENEFIT SOCIETY—SOCIETY CARRYING ON ORDINARY BANKING BUSINESS—CONTRIBUTIONS PAID IN LUMP—GUARANTEED INTEREST PAID TO MEMBERS, WHETHER EXEMPT FROM TAX—'INTEREST ON BORROWED CAPITAL'—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 10 (2) (*iii*).

The assessees were a limited company registered under the Indian Companies Act with an authorised capital of Rs. 3 lakhs divided into 12,000 shares, and the main objects of the company were to enable the shareholders to save money and to carry on banking business by receiving deposits from and granting loans to the public. The articles of association provided that the full amount

due on each share was payable in lump, that the paid-up share capital was to carry guaranteed interest at the rate of 6½ per cent. per annum, and the net income after payment of this guaranteed interest was to be divided as profits. There was also a provision empowering shareholders to transfer their shares. It was contended on behalf of the company that the guaranteed interest paid to shareholders on the capital contributed by them was interest on borrowed capital within Section 10 (2) (iii) *of the Income Tax Act and should be deducted in computing the assessable income of the company* : Held, *that in order to satisfy the requirements of the explanation to Section 10* (2) (iii), *there must be recurring subscriptions paid periodically by the subscribers of a mutual benefit society. The company in the present case was not a mutual benefit society as its banking transactions were not confined to its own members, and the payment was also not a recurring one. The amount paid to shareholders as guaranteed interest could not, therefore be deemed to be interest on borrowed capital and could not be deducted in computing the profits of the company.*

COMMISSIONER OF INCOME TAX, MADRAS *v.* MADURA HINDU PERMANENT FUND LTD. [1933] (I.L.R. 56 Mad. 415; 64 M.L.J. 260; 1 I.T.R. 46) *distinguished.*

Reference made by the Commissioner of Income Tax, Madras, under Section 66 (2) of the Income Tax Act, XI of 1922. (O. P. No 33 of 1934).

The material portion of the reference made by the Commissioner was as follows—

"2. The petitioner is a limited company registered on 5th December, 1881, under the Indian Companies Act (X of 1866). Its authorised capital is Rs. 3 lakhs divided into 12,000 shares of Rs. 25 each. The subscribed and paid-up capital on 30th November, 1932, was Rs. 2,47,475 (9,899 shares). The objects of the company as set- out in its memorandum and articles of association are :

(1) to enable shareholders to save money ;

(2) to grant loans on jewels, landed property, Government promissory notes and other approved securities ;

(3) to receive fixed deposits from the public on such terms and conditions as may be fixed by the Managing Committee from time to time (Article 19);

(4) to make a permanent provision for payment of a grant-in-aid to the Sriman Madhwa Siddhantha Onnahini Sabha; and

(5) to do all such other things as are incidental or conducive to the attainment of the above objects.

Under Article 2 (*h*) of the articles of association the full amount of capital due on a share is to be paid in one lump sum. According to Article 5 (*a*) the paid-up capital of the shareholder is to carry guaranteed interest at the rate of 6½ per cent. per annum. Under Article 5 (*b*) the net income earned by the company after deducting the cost of establishment, the other incidental charges and the interest payable under Article 5 (*a*) is to be treated as the Nidhi's profits for the year. According to Article 5 (*d*) the interest above referred to is payable immediately after the expiry of the year (30th November). Article 6 (*b*) provides that a shareholder may, with the sanction of the Directors transfer the whole of his paid-up capital on any particular share or shares to any other person. According to Article 7 (*a*) the shareholder or his heir and legal representative or his registered nominee is entitled to withdraw the whole or any part of his share capital after giving 6 months' previous notice. In such a case the shareholder is to be paid also the interest accrued on the share capital up to the date of withdrawal under Clause (*b*) of Article 7. Article 19 authorises the company to receive deposits from the public and Article 20 to give loans both to the shareholders and non-shareholders. The petitioner is not a mutual benefit society. A copy of the memorandum and articles of association is filed, marked Exhibit A.

3. For the assessment of 1933-34 (previous year, year ending 30th November, 1932) the petitioner company filed the return of income on 14th June, 1933 showing therein a net income of Rs. 27,163 from business. In arriving at this figure the petitioner company added back, amongst other things, to the net profit disclosed by its accounts Rs. 16,569 being the 'guaranteed interest' paid to its shareholders on the paid-up share capital according to Article 5 (*a*) referred to in paragraph 2

above. This procedure has been uniformly adopted by the petitioner company in all its previous assessments and the company has been subjected to tax on such interest in all the previous years. During the assessment proceedings for 1933-34, however, the petitioner company claimed that this guaranteed interest should be allowed as a deduction in computing its profits. The Income Tax Officer disallowed the claim on the ground that the guaranteed interest paid was interest on the subscribed capital of the company and not interest on borrowed capital within the meaning of Section 10 (2) (*iii*) of the Act.

4. The petitioner company appealed to the Assistant Commissioner and contended :

(1) that the amount on which guaranteed interest was paid was and should be deemed to be capital borrowed for purposes of the business, that it was repayable like a deposit, that it did not cease to be borrowed capital simply because the terms 'shares' and 'subscriptions' were used in the articles of association ;

(2) that the guaranteed interest was payable irrespective of the existence of profits and was in no way dependent on the earning of profits ;

(3) that the provisions of the company law should not be imported in construing the sections of the Income Tax Act ; and

(4) that there was no difference between the guaranteed interest paid by it and that paid by the Mylapore Hindu Permanent Fund and other Funds.

The Assistant Commissioner overruled the petitioner company's contentions for the reasons stated in his order, a copy of which is filed, marked Exhibit B.

5. The petitioner company now requires me to refer to the High Court the following question arising out of the Assistant Commissioner's order :

" Whether the assessee is entitled to claim in computing the assessable income a deduction of the sum of Rs. 16,569 paid by way of guaranteed interest to the members ".

6. The petitioner company contends—

(1) That having regard to the general scheme of its articles of association the payment of guaranteed interest on the

paid-up capital contributed by the shareholders amounts to interest paid on borrowed capital within the meaning of Section 10 (2) (*iii*) of the Act;

(2) that the view of the Assistant Commissioner, *viz.*, that the share capital of an incorporated company can in no event be considered to be borrowed capital, is negatived conclusively by the decision of the High Court in the case of the Madura Hindu Permanent Fund; and

(3) that if recurring subscriptions which do not strictly fall within the explanation to Section 10 (2) (*iii*) of the Act could be deemed to be borrowed capital within the meaning of sub-Clause (*iii*) of Section 10 (2), the contributions made in a lump sum by the members at the commencement of their membership must be so considered with greater reason according to the observations of the Chief Justice in the Madura Hindu Permanent Fund case.

Whatever may be the exact position of the petitioner company under the Indian Companies Act, it does not, for more reasons than one, fall within the class of cases governed by the decision of the High Court in the Madura Hindu Permanent Fund case.

Firstly, its subscribed capital is not composed of recurring subscriptions payable periodically and repayable automatically at the end of the specified period with the guaranteed interest as was the case with the Madura Hindu Permanent Fund, but consists of single contributions which may be left in the hands of the company for an indefinite period, and in any event, are only withdrawable after six months notice. Secondly, the petitioner company like an ordinary banking company carries on business with the public for the benefit of its shareholders and does not confine its transactions to members or shareholders. Thirdly, the shares of the petitioner company are transferable like those of an ordinary company, while the accumulation of the recurring subscriptions of the Madura Fund is not so transferable. I am of opinion, therefore, that the principle of the decision in the Madura Hindu Permanent Fund case is not applicable to the petitioner company. Since the capital of the company consists of moneys contributed by the shareholders which they are at liberty to withdraw, it is clear that the "guaranteed interest"

cannot be paid out of capital and must be paid out of profit and payment must be dependent on the earning of profit. It is in fact a distribution of profit which takes the form of interest at a fixed rate because the amount of the profit can be forecast with some accuracy. It is thus akin to the dividend payable on the cumulative preference shares of an ordinary trading company. It is not interest on borrowed capital deductible under Section 10 (2) (*iii*) of the Act. The question should therefore be answered in the negative."

M. Patanjali Sastri, for the petitioner.

K. S. Krishnaswami Aiyangar and *N. Srinivasa Aiyangar*, for the respondents.

THE CHIEF JUSTICE.—The assessees are a limited company registered under the Indian Companies Act with an authorised capital of Rs. 3,00,000 divided into 12,000 shares of Rs. 25 each. The subscribed and the paid-up capital on the 30th November, 1932, was Rs. 2,47,475 in 9,899 shares. The objects of the company as set out in its memorandum and articles of association are :—

(1) to enable shareholders to save money ;

(2) to grant loans on jewels, landed property, Government promissory notes and other approved securities ;

(3) to receive fixed deposits from the public on such terms and conditions as may be fixed by the Managing Committee from time to time ;

(4) to make a permanent provision for payment of a grant-in-aid to the Sriman Madhwa Siddhantha Onnahini Sabha ; and

(5) to do all such other things as are incidental or conducive to the attainment of the above objects.

The important articles of association are: Article 2 (*b*) which provides that the full amount of capital due on a share is to be paid in one lump sum, Article 5 (*a*) which provides that the paid up capital of the shareholders is to carry guaranteed interest at the rate of 6½ per cent. per annum, Article 5 (*b*) which provides that the net income earned by the company after deducting

the cost of establishment, the other incidental charges and the interest payable under Article 5 (*a*) is to be treated as the Nidhi's profits for the year, Article 6 (*b*) which provides that a shareholder may, with the sanction of the directors, transfer the whole of his paid-up capital on any particular share or shares to any other person, and Article 7 (*a*) according to which the shareholder or his heir and legal representative or his registered nominee is entitled to withdraw the whole or any part of his share capital after giving six months' previous notice and in such a case the shareholder is to be paid also the interest accrued on the share capital up to the date of withdrawal. Article 19 authorises the company to receive deposits from the public and Article 20 to give loans both to the shareholders and non-shareholders.

The respondents claim that an amount of Rs. 16,569 which is the guaranteed interest paid to their shareholders on the paid-up share capital according to Article 5 (*a*) is not liable to be assessed to income tax by reason of Section 10 (2) (*iii*) of the Indian Income Tax Act. Section 10 (1) provides that the tax shall be payable by an assessee under the head ' business ' in respect of the profits or gains of any business carried on by him and sub-Section (2) that such profits or gains shall be computed after making the following allowances, namely, *inter alia*, (3) in respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of interest paid. The respondents contend that the paid-up capital which carried interest is capital borrowed for the purpose of the business, the interest payable upon it not being in any way dependent on the earning of profits. Hence they claim that this sum of Rs. 16,569 the interest upon that borrowed capital, must be deducted from the profits and gains of the business. In support of the respondent's case, reliance was placed upon *Commissioner of Income Tax, Madras* v. *Madura Hindu Permanent Fund, Ltd.*, [(1932) I.L.R. 56 Mad. 415] a decision upon an income tax reference, of a Bench consisting of five Judges. It is contended that the facts of the present case are indistinguishable from the facts there. In my view, that decision cannot be applied to this case as the facts are clearly distinguishable. There the assessee company was a mutual benefit society although it had

not been prescribed. It was, like the respondent company here, incorporated as a limited company under the Indian Companies Act of 1882. It had its capital contributed by *A* and *B* class subscribers at the rate of Re. 1 per mensem per share. The subscribers in *A* class paid their subscriptions for 45 months and those in *B* class for 84 months. As soon as an *A* class subscriber had paid Rs. 45 for one share in that manner, his account, in so far as that particular share was concerned, was closed, and he was paid off with a sum of Rs. 50. A *B* class subscriber was paid off at the end of 84 months with Rs. 102-8-0. The amounts of Rs. 5 and Rs. 18-8-0 thus paid out to *A* and *B* class subscribers in excess of their subscriptions to the fund were called 'guaranteed interest'. Although the rules of the fund made provision for deposits and loans by and to non-subscribers or co-operative societies, in fact all the transactions of the fund were with its own members. The members of the fund subscribed the capital and the subscribed capital was lent to them. A sum of Rs. 68,000 odd was in the year of account distributed by the fund in the shape of guaranteed interest to the *A* and *B* class subscribers and the fund claimed to be entitled to deduct that sum from its total income during the year of account. It was held that this guaranteed interest was interest on capital borrowed for the purpose of the fund's business within the meaning of Section 10 (2) (*iii*) of the Income Tax Act, that is payment was not in any way dependent on the earning of profits and that the fund was entitled to claim a deduction in respect of the amount distributed as guaranteed interest. It was also held that the fund was a mutual benefit society with a fluctuating capital dependent entirely upon the amount subscribed by its members and the repayment of subscriptions plus the guaranteed interest to the members and that the subscriptions, though called share capital, were not really so, nor were they capital borrowed for the purpose of the business as that capital is ordinarily understood, this being shown by the explanation to Section 10 (2) (*iii*) of the Income Tax Act. It is clear upon an examination of the answers given to the questions referred that they were based entirely upon a construction of the latter explanation. This was a mutual benefit society, the subscriptions were recurring and were paid periodically by the shareholders or subscribers and as

such were deemed to be capital borrowed within the meaning of Section 10 (2) (*iii*). It was contended there on behalf of the assessees that this was not really share capital at all but subscription capital raised by recurring subscriptions paid periodically by shareholders. In dealing with this contention on page 427 (of 56 Mad.) I say :

"In my opinion, although these subscriptions are called share capital, they are not really so as that description is understood in its ordinary sense, nor is this capital borrowed for the purpose of the business as that capital is ordinarily understood. It is something different from both. That this is so and that the legislature recognised the distinction is clearly shown by the explanation to Section 10 (2) (*iii*) of the Income Tax Act where recurring subscriptions paid periodically by shareholders or subscribers in such mutual benefit societies as may be prescribed are to be 'deemed' to be capital borrowed within the meaning of Section 10 (2) (*iii*). If it is to be deemed to be capital borrowed, then it is not really capital borrowed but is for the purpose of the Indian Income Tax Act to be so considered. The fact that no mutual benefit societies have as yet been prescribed may be due to various causes with which we are not really here concerned. What we are concerned with is the apparent intention of the legislature to recognise an association of persons not having share capital but borrowing and lending from and to themselves for the mutual benefit of themselves. This borrowing is to be deemed to be a borrowing of capital."

The facts of the present case are very different. The respondents are not a mutual benefit society but are an ordinary banking concern. They are not concerned to transactions only with their own members. The shares are to be paid for in one lump sum ; and to my mind this is an all important distinguishing feature. In order to satisfy the requirements of the explanation to Section 10 (2) (*iii*), there must be recurring subscriptions paid periodically. 'Recurring' means a happening again and again, not that which occurs only once. There is here no periodical payment and this is not a mutual benefit society. It is only if those conditions are to be found that that which is not capital borrowed is to be deemed to be capital borrowed. This capital then clearly cannot be given that description and

unless it is capital borrowed the allowance claimed under Section 10 (2) (*iii*) cannot be permissible. Not being capital borrowed, the question as to whether the interest thereon is or is not in any way dependent on the earning of profits does not arise.

The answer to the question referred must, therefore, be in the negative. The Commissioner of Income Tax will get Rs. 250 costs.

RAMESAM, J.—I agree.

SUNDARAM CHETTY, J.—I agree.

Question answered against assessee.

[IN THE NAGPUR JUDICIAL COMMISSIONER'S COURT].

SHAMA RAO AND ANOTHER *v.* MOTIRAM AND OTHERS.

Pollock, A. J. C.

February 14, 1934.

INCOME TAX—STATEMENTS MADE IN INCOME TAX PROCEEDINGS—PRIVILEGE—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 54.

The intention of Section 54, Income Tax Act, is to encourage an assessee to make a full and true disclosure of all relevant facts within his knowledge, knowing that any statement made by him will not subsequently be used against him. Such statements are confidential and it is open to a person to refuse to answer interrogatories on statements made by him in income tax proceedings on the ground that they are privileged.

Civil Revision Petition No. 257-B of 1933.

M. R. Bobde, for the applicants.

J. R. Chandorkar, for first respondent.

POLLOCK, A.J.C.—The suit out of which this application for revision arises was apparently instituted on 14th November, 1929, though the date of presentation has not been endorsed on the plaint and the date on the order-sheet is illegible. On 2nd February, 1931, the plaintiff sought to file copies of certain statements said to have been made by defendants 2 and 3 in income tax proceedings and of orders passed by the Income Tax Officer in those

proceedings. The lower Court held that these were confidential documents by virtue of Section 54, Income Tax Act, and that copies of them were inadmissible in evidence. Issues were framed on the same date. The case was delayed for about a year while the plaintiffs unsuccessfully sought revision in this Court of the order rejecting the above documents. The case was fixed for evidence on 24th June, 1932, and the plaintiffs' case was closed in default on 28th September, 1932, but subsequently reopened. On 25th September, 1933, the Income Tax Officer was examined on behalf of the plaintiffs who attempted to put to him the certified copies of the statements made to him by defendants 2 and 3 and to ask him questions about the assessment of these defendants. This was disallowed.

In the meantime the plaintiffs had sought leave on 21st April, 1933 and 22nd April, 1933, to deliver interrogatories to defendants 2 and 3 asking whether they had made certain statements before the Income Tax Officer. These defendants objected to such interrogatories but replied that they did not remember what statements they had made. The lower Court held that these answers were insufficient and ordered under Order XI, Rule 2, that the defendants should make sufficient answers. Against that order the defendants now seek revision. A party may deliver interrogatories in order to ascertain the nature of his opponent's case or to support his own case, in order to narrow the points in issue or to avoid proving facts which are admitted. Under the Evidence Act the contents of documents may not, except when secondary evidence is admissible, be proved by oral evidence because it is a cardinal rule that, where written documents exist, they shall be produced as being the best evidence of their own contents. The plaintiffs have admittedly adopted the procedure of delivering interrogatories in order to prove the contents of documents which have been held inadmissible in evidence, and I think that this procedure is entirely misconceived. It is open to a party to object to state the contents of a written document or to reply that the said document when produced will be the best evidence of its own contents: see Odgers on Pleading and Practice, Edn., 8, at pp. 304 and 305. Under Order XI, Rule 2, leave shall be given as to such only of the interrogatories submitted

as the Court considers necessary either for disposing fairly of the suit or for saving costs. Under this rule to which the lower Court has not referred I do not see how interrogatories as to the contents of written documents can be said to be necessary either for disposing fairly of the suit or for saving costs.

The clear intention of Section 54, Income Tax Act, is to encourage an assessee to make a full and true disclosure of all relevant facts within his knowledge, knowing that any statement made by him will not subsequently be used against him. Such statements are described by the Act as confidential, and I think that, it is certainly open to an assessee to object to answering interrogatories on statements made by him in such proceedings on the ground that they are privileged. The order of the lower Court, therefore, appears to me to be obviously wrong. It has been urged that, even so, I have no power to interfere in revision. The order of the lower Court undoubtedly amounts to a case decided, according to the view of this Court, and I am of opinion that there has at least been a material irregularity in allowing interrogatories which are not necessary either for disposing fairly of the suit or for saving costs and that it is necessary to intervene at this stage to prevent injustice being done. The application for revision is therefore allowed with costs, and the lower Court's order that the defendants shall further answer interrogatories is set aside. Counsel's fee in this Court is Rs. 20.

Application allowed.

[IN THE NAGPUR JUDICIAL COMMISSIONER'S COURT.]

COMMISSIONER OF INCOME TAX, C. P.

v.

BAXIRAM RODMAL.

Subhedar and Pollock, A. J. Cs.

April 6, 1934.

INCOME TAX—ADJOURNMENT—DUTY TO INFORM ASSESSEE OF ADJOURNED DATE—NOTICE—VALIDITY OF SERVICE—DUTY OF INCOME TAX OFFICERS TO SEE THAT NOTICE IS SERVED ON AUTHORISED AGENTS.

Though ordinarily it is the duty of the assessee who applies for an adjournment to find out the date fixed, yet if the Income Tax Officer tells the assessee that an adjournment will be allowed and that the adjourned date will be intimated to him, it is not incumbent on the assessee to find out that date but he is entitled to await the promised information.

The mere fact that a person had accepted notices on behalf of the assessee on previous occasions and appeared for the assessee would not constitute him an agent on whom a notice or requisition under the Act could be validly served, nor would any statement made by him bind the assessee.

Dictum: '*Income Tax Officers, in doing the very important work of assessing income tax, must take the elementary precaution of seeing that the person with whom they are dealing is in fact authorised to represent the assessee and they are not entitled to assume this merely because such person has on occasions signed a notice, possibly under pressure or produced account books for inspection.*'

Cases referred to:

COMMISSIONER OF INCOME TAX, MADRAS *v.* PERIANNA PILLAI [1939] (58 M.L.J. 10; 122 I.C. 449; 4 I.T.C. 217; A.I.R. 1930 Mad. 113).

JANGAI BHAGAT RAMAWTAR *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA [1930] (I.L.R. 8 Pat. 877; 121 I.C. 332; A.I.R. 1930 Pat. 127; 3 I.T.C. 418).

Reference made by the Commissioner of Income Tax, Central Provinces, under Section 66 (2) of the Income Tax Act (XI of 1922) [Mis. Jud. Cas. No. 24-B of 1933].

D. N. Chowdhry, for Commissioner of Income Tax.

A. V. Khare and *W. B. Pendharkar*, for the assessee.

ORDER.—The Commissioner of Income Tax, in compliance with this Court's order, has referred certain questions under Section 66 (2), Income Tax Act, for our decision. The Income Tax Officer issued a notice under Section 23 (2) of the Act to the assessee, a joint Hindu family. This was served on Asaram, the accountant of the joint family business. In response to that notice Kisanlal, a member of the joint family, appeared on

19th December, 1930 and asked for further time in which to produce his accounts. It is not apparent from the order sheet exactly what happened but it has been conceded before us that the Income Tax Officer told him that an extension would be allowed and that the date for futher hearing would be intimated to him. A notice, in the form used for notices under Section 23 (2), was issued to the joint family and served on Asaram at the joint family shop. The date fixed was 8th January, 1931, and on that date no one appeared. The Income Tax Officer accordingly made an *ex parte* assessment under Section 23 (4). On 28th February, 1931, the assessee applied under Section 27 to have the assessment cancelled and affidavits were filed by Asaram and Kisanlal stating that the contents of the second notice were not communicated by Asaram to Kisanlal. The Income Tax Officer held that Asaram had implied authority to accept notices and that therefore Kisanlal had a reasonable opportunity to comply with the notice. On appeal the Assistant Commissioner held that a notice to Asaram was a valid notice to the assessee and also that no notice was in fact necessary.

Under Section 63 (1) of the Act a notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Civil Procedure Code, and such notice or requisition may, in the case of a Hindu undivided family, be addressed to any adult male member of the family. Order III, Rule 2, Civil Procedure Code, defines " recognized agents " and Rule 3 provides that processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person. Order V, Rule 12 provides that service shall, wherever it is practicable, be made on the defendant in person, unless he has an agent empowered to accept service in which case service on the agent shall be sufficient. Order III, Rule 6 provides that, besides the recognized agents described in Rule 2, any person may be appointed as agent to accept service of process, but such appointment must be made by an instrument in writing signed by the principal. It is not suggested that Asaram was a recognized agent or had been appointed an agent to accept service by an instrument in writing, and the petitioner

has therefore urged that there was no valid service on the assessee.

The Commissioner of Income Tax has supported the finding of the Assistant Commissioner that it was incumbent on the assessee to find out for himself the date to which the case had been adjourned and that it was not necessary for the Income Tax Officer to inform him of that date. Ordinarily it may be the duty of the assessee who applies for an adjournment to find out the date fixed, but when the Income Tax Officer tells the assessee that an adjournment will be allowed and that the adjourned date will be intimated to him, we are of opinion that it is not incumbent on the assessee to find out that date but that he is entitled to await the promised information: *Commissioner of Income Tax, Madras* v. *Perianna Pillai*. It appears that Asaram has received notices on behalf of the assessee on previous occasions and has appeared before the Income Tax Officer on behalf of the assessee. In giving evidence Asaram stated:

"I used to take income tax notices addressed to my master. Whenever the owner was in the shop he used to take them but in his absence I was not taking the notices but the process server threatened me that he would return the notice with the remark that the assessee refuses to take the notice though he is present. I had therefore to take the notice."

The mere fact that Asaram had acted on some occasions in this way would not constitute him an agent on whom a notice or requisition under the Act could be validly served, nor would any statement made by him bind the assessee, and we see no reason why a notice informing the assessee of the adjourned date should be deemed to be validly served when it was merely served on Asaram. The decision in *Jangai Bhagat Ramawtar* v. *Commissioner of Income Tax, Bihar and Orissa*, to which reference has been made, does not help the Commissioner of Income Tax because the assessee in that case contended that he had to be served personally and it was held that service on a gomastha, who was his accredited agent, was valid service; it is not clear whether the gomastha was a recognized agent or had been authorized in writing to accept service, and there is no discussion of this point.

The Commissioner of Income Tax has stated that he does not believe the affidavits stating that the contents of the notice were not communicated by Asaram to Kisanlal; but even if these affidavits be disbelieved, a point which has not been considered by the Income Tax Officer and Assistant Commissioner, there is no evidence to show that the notice did in effect reach Kisanlal. We do not think it unreasonable to insist that Income Tax Officers, in doing the very important work of assessing income tax, must take the elementary precaution of seeing that the person with whom they are dealing is in fact authorized to represent the assessee, and they are not entitled to assume this merely because such person has on occasions signed a notice, possibly under pressure, or produced account books for inspection. Our answers on the points referred to us are :—(1) and (2): The service of the notice on Asaram was not a valid service on the assessee. (3): The assessee had not a reasonable opportunity to comply with the notice. The assessee's petition must therefore be allowed with costs. Counsel's fee Rs. 50.

Petition allowed.

[IN THE LAHORE HIGH COURT]

ROCHI RAM KHATTAR

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June. 22, 1934.

INCOME TAX—BEST JUDGMENT ASSESSMENT—FAILURE TO SUBMIT RETURN—SUFFICIENCY OF CAUSE—REFERENCE—BEST JUDGMENT ASSESSMENT WITHOUT NOTICE FOR PRODUCTION OF ACCOUNTS—VALIDITY—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 22 (4) AND 23 (4).

On an assessment under Section 23 (4) of the Income Tax Act for failure to submit a return no question of law arises for a reference to the High Court. The decision of the Income Tax Officer that no sufficient cause for non-submission of the return was shown by the assessee upon whom the onus lay, is in such case a finding of fact. It is entirely within the discretion of the Income

Tax Officer to issue a notice under Section 22 (4) of the Act before making a best judgment assessment, and the omission to do so before acting under Section 23 (4) does not raise any question of law for reference to the High Court.

AMRIT WAMAN DALAL v. COMMISSIONER OF INCOME TAX, C. P. AND BERAR [1933] (6 I. T. C. 301), followed.

Petition under Section 66 (3) of the Income Tax Act praying the High Court to require the Commissioner of Income Tax, Punjab and N. W. F. P., to state a case and refer it to the High Court. [Petition No. 44 of 1933].

Achhru Ram and *Kirpa Ram Bajaj*, for the petitioner.

J. N. Aggarwal, for the Crown.

ORDER.—This is a petition by *Rai Sahib* Rochi Ram Khattar under Section 66 (3) of the Income Tax Act for a direction to issue to the Income Tax Commissioner to refer a question to this Court for decision. The facts are as follows :—The Income Tax Officer served a notice on the petitioner under Section 22 (2) of the Income Tax Act calling upon him to submit a return of the income for the previous year within thirty days of the receipt thereof. The return should have been put in not later than 24th May, 1931. On the 13th May, 1931, the petitioner applied for further time and obtained an extension up to the 17th June, 1931. He obtained a further extension up to the end of July 1931. On that occasion the petitioner was told that the assessment would be taken in hand immediately after that date. On the 11th July, 1931, another extension was applied for. Of course, the assessee was at liberty under Section 22 (3) to make a return at any time before the assessment was made, and though in fact the assessment was not made till the 30th November, 1931, no return was ever put in. It is pointed out by the Commissioner that the failure of the assessee to comply with the notice under Section 22 (2) was in itself sufficient to justify the Income Tax Officer in making the assessment to the best of his judgment under Section23 (4) without calling for accounts. He did not, however, do this. He served a notice on the assessee on the 29th October, 1931, under Section 22 (4) calling upon him to produce his accounts at Bannu on the 5th November, 1931. The assessee asked for time to be extended for this purpose. The Income Tax Officer refused and stated that the

accounts should be produced without fail at Bannu on the 5th November, 1931, but later he adjourned the case to the 10th November, 1931, and issued another notice under Section 22 (4) for production of accounts on this date. A further adjournment was applied for and granted by the Income Tax Officer, time being extended to the 21st November, 1931, and for this date another notice was issued under Section 22 (4). The petitioner approached the Assistant Commissioner of Income Tax who telegraphed the Income Tax Officer to adjourn the case to the 30th November, 1931. At the same time he expressly told the assessee that the accounts should be produced before the Income Tax Officer on the morning of that date. Even on that date the accounts were not produced or a return made. The assessment was therefore, made to the best of the Income Tax Officer's ability. On the 1st of December, 1931, an application dated the 30th November, 1931, was presented to the Income Tax Officer alleging that owing to the break down of a lorry the petitioner could not reach the Income Tax Office till very late on the evening of the 30th November. The Income Tax Officer noted that no account books were brought to his office on that day and told the assessee to make a proper application under Section 27. This was done but it was rejected. An appeal against the order of rejection of the petition under Section 27 was dismissed by the Assistant Commissioner. The Commissioner of Income Tax was then moved. He declined to interfere and also declined to state a case to this Court on the ground that no question of law arose. Thereupon the petitioner put in the petition which is before us for decision.

It was held in *Amrit Waman Dalal* v. *Commissioner of Income Tax, C. P. and Berar*, that on an assessment under Section 23 (4) of the Income Tax Act for failure to submit a return no question of law arises for a reference to the High Court. The decision of the Income Tax Officer that no sufficient cause for non-submission of the return was shown by the assessee, upon whom the onus lay, is a finding of fact. It was further held that it was entirely within the discretion of the Income Tax Officer to issue a notice under Section 22 (4) of the Act and the omission to do so before acting under Section 23 (4) did not raise any question of law for reference to the High Court. This case applies with full force to the case before us. In fact the case

before us is worse; for the Income Tax Officer issued several notices under Section 22 (4) of the Act and they also were not complied with.

For the reasons given we find that there is no question of law to refer to this Court and we dismiss this petition with costs to the Commissioner of Income Tax.

Petition dismissed.

[IN THE LAHORE HIGH COURT].

AMAR SINGH

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June 22, 1934.

INCOME TAX—DEPRECIATION ALLOWANCE—PRINTING PRESS —DEPRECIATION ON FURNITURE AND TYPE—TYPE, WHETHER MACHINERY OR PLANT--INCOME TAX RULES, RULE 8—INCOME TAX ACT (XI OF 1922), SECTION 10 (2 (*vi*).

Furniture is subject merely to the general rate of 5 per cent. depreciation since it is not part of the machinery. The special rates allowed in the remark column attached to item No. 2 of the Schedule in Rule 8 of the Rules made under Section 59 of the Income Tax Act apply only to electric machines. An assessee who wishes to secure the advantage of these special rates should, therefore, apply to be assessed on the electric portion of the machinery separately from the furniture.

The High Court directed the Commissioner to refer to it the question whether the type used in a printing press is part of the 'machinery' or 'plant' of the press within the meaning of Section 10 (2) (vi) of the Income Tax Act.

Petition under Section 66 (3) of the Income Tax Act (XI of 1922), praying the High Court to require the Commissioner to state a case and refer it to the High Court [Petition No. 459 of 1932].

Kirpa Ram Bajaj, for the petitioner.

Asa Ram Aggarwal, for *J. N. Aggarwal*, for the Crown.

ORDER.—Sardar Amar Singh, proprietor of the Model Electric Press, Lahore, has applied under sub-Section (3) of Section 66 of the Income Tax Act against a refusal of the Commissioner to state a case.

The applicant has been assessed for the year 1929-30 in respect of an electric press house in a "first class building" in Lahore; and the point involved in this application is the amount of depreciation permissible to the applicant under Clause (*vi*) of sub-Section (2) of Section 10 of the Income Tax Act.

The first question raised is whether the assessee is entitled to claim depreciation on the business premises at 5 per cent. instead of 2½ per cent. on the authority of the first remark in the 'column of remarks' of the statement prescribed in the rules for the depreciation of buildings [see Rule 8 of the Rules made under Section 10 (2) (*vi*) of the Act.] We agree with the Income Tax Commissioner that no question of law here arises. The petitioner claims a higher rate of depreciation on the ground of the alleged severe vibration caused by an electric plant of 440 voltage. It seems that the petitioner produced no evidence before the Income Tax Commissioner to prove the effect of the alleged vibration. The Commissioner has come to a finding of fact that the Electric Press cannot be held to cause any special deterioration of the buildings. Under these circumstances, no question of law arises for our decision. The applicant will be at liberty to reopen this question before the Commissioner in connection with future assessment and support his case by producing expert evidence on the question of the effect of vibration on the building.

The next point raised in this application is the rate of depreciation to be allowed on the furniture under item 2 of the Schedule in Rule 8 made under Section 10 (2) (*vi*) of the Act. It is obvious from the Schedule in question that furniture is subject merely to the general rate of 5 per cent. depreciation since furniture is clearly not a part of the machinery. The special rates allowed in the remarks column attached to item No. 2 apply only to electric machines. If the applicant wishes to secure the advantage of these special rates, he should apply to be assessed on the electric portion of the machinery

separately from the furniture. We agree with the Income Tax Commissioner that on this point, no question of law arises.

The only other question pressed before us is the question whether "type" forms part of the machinery of the press. Clause (*vi*) of Section 10 (2) of the Act allows depreciation for machinery and plant; and it was urged by the applicant before the Income Tax Commissioner that type is part of the machinery. The Commissioner held that in this respect the petitioner was laying claim to something not provided for by law and that no point of law therefore arises.

It is argued before us that "type" is an essential part of the machinery because without the type the machinery of the press would be useless. We are informed that the income tax authorities while not allowing depreciation in respect of the type, do make allowances for replacements; but it is contended that the allowance for replacement is far less than the depreciation permitted by the Act if it be held—as is now pleaded that "type" is included in the articles in respect of which deprecia- is allowed by Clause (*vi*) of Section 10. The only authority to which our attention has been directed in this connection is *Corporation of Calcutta* v. *Chairman of Cossipore Municipality* [I.L.R. 49 Cal. 190], a Privy Council ruling in which it was held that a large tank erected by the Cossipore Corporation in connection with the Calcutta Water Supply and intended to increase the supply during the part of the day when the hourly consumption exceeded the capacity of the reservoir, was not "machinery". It is clear that this ruling is not on all fours with the present case. It does, however, appear to us that a substantial point of law does arise in, *viz.*, whether in the case of the printing press in suit "type" is part of the machinery or plant. Clause (*vi*) uses both expressions 'machinery' and 'plant.' It may be open to doubt whether type is a part of the machinery but the expression "plant" has obviously a far wider application than the expression "machinery", and, even though type may be held not to be part of the machinery, it does appear arguable that it is part of the "plant."

Accordingly we accept this application to the extent of requiring the Commissioner to state a case and refer to this

Court a question of law which we would formulate as follows :—

"Is the type in use at the Model Electric Press, Lahore, part of the machinery or plant of the Press within the meaning of Clause (*vi*) of sub-Section (2) of Section 10 of the Income Tax Act ?"

The rate of depreciation would be a matter for the income tax authorities to decide.

We make no order as to costs of this application.

Application allowed.

[IN THE LAHORE HIGH COURT.]

SALIGRAM RAMLAL

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June 22, 1934.

INCOME TAX—JOINT HINDU FAMILY—APPLICATION FOR REGISTRATION AS FIRM—PARTITION BY METES AND BOUNDS, WHETHER NECESSARY—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 25-A.

Section 25-A of the Income Tax Act contemplates an actual partition by metes and bounds of the joint family property and not a mere change of the coparcenary to a tenancy in common by a severance of the joint status.

Section 25-A is the only section applicable when a joint Hindu family claims to have ceased to be such and the members claim to be assessed as separate entities. The further question whether they should be registered as a firm only arises after that.

Petition under Section 66 (3) of the Income Tax Act (XI of 1922), praying the High Court to require the Commissioner of Income Tax, Punjab and N. W. F. P. to state a case and refer the same to the High Court.

Achhru Ram and *Kirpa Ram Bajaj*, for the petitioners.

Asa Ram Aggarwal for *J. N. Aggarwal*, for the Commissioner.

JUDGMENT.—The business Salig Ram Ram Lal was assessed for the year 1930-31 as a Hindu undivided family. The family consists of Ram Lal and his only son Amar Nath. In connection with the assessment for that year Ram Lal, the head of the family, put in a deed, dated the 17th March, 1930, to the effect that the business was being run as a firm constituted by himself and his son Amar Nath, the shares of the partners being equal. The capital as well as the profits of the firm from the 10th April, 1926, to 31st March, 1930, were to be distributed among the partners and it was claimed that the agreement would consequently take effect for previous years as well. An application was submitted for registration of the firm under Section 2 (14) and 26-A of the Income Tax Act. There was also a definite claim on the ground that partition had taken place. Previous assessments had been made on the family as a Hindu undivided family. The Income Tax Officer enquired into the matter and came to the conclusion that the instrument of partnership was a bogus one and had only been executed for the purpose of deriving an improper advantage from the provisions of the Income Tax Act. He gave weighty reasons for coming to this decision and refused to register the partnership. As a result the family was assessed as an undivided Hindu family. There was an appeal to the Assistant Commissioner of Income Tax who came to the conclusion on the evidence not only that there had been no separation in status of the members of the family, but also that the joint family property had not been partitioned among the two members constituting it. He, therefore, held that the Income Tax Officer had correctly refused to register the firm. The assessee then approached the Commissioner of Income Tax under Sections 33 and 66 (2) of the Income Tax Act. He declined to interfere under Section 33 and refused to make a reference to this Court on the ground that the question was one of fact. The assessee has now put in an application under Section 66 (3) of the Income Tax Act asking this Court to require the Commissioner of Income Tax to state a case and to refer it for decision.

In the petition it is stated that the following points of law arise out of the order of the Assistant Commissioner :—

1. Whether Section 25-A of the Income Tax Act contemplates actual partition of the joint property by metes and bounds ?

2. Whether, under the circumstances of the present case, the petitioner firm should be assessed as a registered firm constituted under the instrument of partnership, dated the 17th March, 1930, or a Hindu undivided family firm ?

3. Was the Income Tax Officer legally justified in refusing the registration of the firm under the provisions of Section 2 (14) and Section 25-A of the Act ?

4. Whether the Assistant Commissioner's finding that the arrangement of partnership was bogus and was executed to escape proper tax is based on proper evidence or materials ?

Section 25-A of the Act runs as follows :—

" Where at the time of making an assessment under Section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition had taken place among the members of such family, the Income Tax Officer shall make such enquiry thereinto as he may think fit, and if he is satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect ".

The opinion of the Commissioner was that the Income Tax Officer could only pass an order under Section 25-A if he was satisfied, first, that separation of the family had taken place and, secondly, that the joint family property had been partitioned among the various members or groups of members in definite portions. It was only after that, that the question of registering the parties as a firm arose. Thus the only question in his opinnion was, whether the assessee was still a member of a Hindu undivided family or of a firm constituted under a deed of partnership. This the Commissioner held to be a question of fact.

The principal contention before us was that Section 25-A did not contemplate an actual partition by metes and bounds of the joint family property. It seems to us that it is impossible so to hold. If actual partition had not been contemplated the clause, " and that the joint family property has been partitioned

among the various members or groups of members in definite portions " would not have been added to the section; for the clause immediately preceding it would be sufficient if the law was that actual partition of the property was not necessary. The preceding clause is, "if he is satisfied that a separation of the members of the family has taken place". In Hindu law, separation of the members of the family can take place without actual partition and when this takes place the members of the family change their status from co-parceners to tenants-in-common of the joint property which ceases to be joint Hindu family property. There was, therefore no necessity for the addition of the second clause, if it was not intended that actual partition by metes and bounds was necessary as well. The words are clear and it is impossible to hold that the legislature added the second clause without intending that it should have a meaning. It was not disputed before us that if actual partition is necessary the Commissioners decision is right. No question of law arises, therefore, as there was ample evidence on which the income-tax authorities could base their finding.

The only other contention raised before us was that registration should have been allowed under Section 26-A of the Act. At the time in question no appeal was given under Section 30 of the Act against a decision refusing to register a firm under Section 26-A. The decision, therefore, of the Income Tax Officer was final in this respect and this concludes the question.

We might add, however, that it seems to us that Section 25-A is the only section applicable when a joint Hindu family claims to have ceased to be such and the members claim to be assessed as separate entities. The further question whether they should be registered as a firm only arises after that. As already remarked there was ample material on which the income-tax authorities could base their finding that the so-called deed of partnership was bogus. This disposes of all the points arising in the case and we dismiss the petition with costs.

Petition dismissed.

[IN THE LAHORE HIGH COURT]

HAJI ALI JAN

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Sale, JJ.

June 27, 1934.

INCOME TAX—METHOD OF ACCOUNTING—SUFFICIENCY OF METHOD TO DEDUCE PROFITS—OPINION OF INCOME TAX OFFICER—FINALITY—APPLICATION FOR REGISTRATION AS FIRM—REFUSAL—RIGHT TO APPEAL—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 13, 26-A, 30 AND 66.

The Income Tax Officer is the sole arbiter on the question of the possibility of deducing the income, profits and gains of the assessee from the method of accounting employed by him and the correctness of the opinion of the Income Tax Officer on this question is a question of fact which cannot be challenged by means of an application under Section 66 of the Act. Under Section 30 of the Income Tax Act, before it was amended in November 1933, it was not open to the Commissioner of Income Tax to refer to the High Court under Section 66 questions arising out of a refusal to register a firm under Section 26-A.

An appeal against the final order of assessment would not justify the Commissioner in re-opening by way of reference to the High Court decisions relating to the method of assessment, which according to the scheme of the Act are final, merely because the assessment may be founded upon them. An order refusing to register a firm made before the Amendment of 1933 cannot, therefore, be attacked in an appeal from the final order of assessment.

Cases referred to :

BULCHAND KESHAVDAS *v.* COMMISSIONER OF INCOME TAX, BOMBAY [1930] (A.I.R. 1930 Sind 301; 128 I.C. 678).

GOKALCHAND JAGANNATH *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1926] (94 I.C. 128; 2 I.T.C. 180; A.I.R. 1926 Lah. 446).

HARIDAS PREMJI *v.* COMMISSIONER OF INCOME TAX, BENGAL [1932] (A.I.R. 1932 Cal. 409; 139 I.C. 497).

KIKHABAI *v.* COMMISSIONER OF INCOME TAX, CENTRAL PROVINCES [1930] (4 I.T.C. 178).

RAMLAL MURLIDAR *In re* [1931] (I.L.R. 58 Cal. 1005; 134 I.C. 1056; A.I.R. 1931 Cal. 682; 5 I.T.C. 150).

Petition under Section 66 (3), Income Tax Act, praying that the High Court may be pleased to require the Commissioner of Income Tax, to state a case and refer it to the High Court of Lahore (No. 665 of 1932).

Kishen Dayal and *Shuja-ud-din*, for the assessee.

J. N. Aggarwal, for the Commissioner.

JUDGMENT.—This is an application by Haji Ali Jan against the refusal of the Income Tax Commissioner to state a case for reference to this Court under Section 66 of the Income Tax Act.

In the course of proceedings relating to the assessment of the petitioner for the year 1931-32, he applied to the Income Tax Officer to be treated as a registered firm under Section 26-A of the Income Tax Act. The Income Tax Officer rejected this application and on the 15th of October, 1931, the Assistant Commissioner declined to entertain an appeal against this order on the ground that no appeal lay under Section 30 of the Act.

The assessment was made by the Income Tax Officer acting under the proviso to Section 13 of the Act. The accounts produced by the assessee contained his trading account for two years, *i.e.*, from 1st April, 1929, to 31st March, 1931; but no profit and loss account was prepared for the previous twelve months, 1st of April, 1930 to 1st March, 1931, on which by law the assessment had to be based. The accounts produced disclosed a net profit of Rs. 39,280 for two years; and as there was no evidence to show that out of this total profit half the sum was earned in each year the Income Tax Officer acting under the proviso to Section 13 computed the difference between Rs. 39,280 and Rs. 14,490 (as assessed in 1930-31) as the income for the year under review.

Lala Kishen Dayal has urged that two questions of law arise from these facts on which the Commissioner should be required to make a reference.

The first point is that the Income Tax Officer was not justified in taking more than one year's profit into account in the assessment for the year under review. The point arises out of the method adopted by the Income Tax Officer of computing

the profits for one year. As stated by the Commissioner, the Income Tax Officer was compelled to act under the proviso to Section 13 of the Act, because the profits could not be properly ascertained from the trading account produced by the petitioner which covered the period of two years. There was thus undoubtedly material for the exercise of the Income Tax Officer's discretion. As held by a Bench of this Court in *Gokal Chand Jagannath* v. *Commissioner of Income Tax, Punjab*, the Income Tax Officer is the sole arbiter on the question of the possibility of deducing the income, profits and gains of the assessee from the method of accounting employed by him. The correctness of the opinion of the officer under these circumstances is a question of fact which cannot be challenged by means of an application under Section 66 of the Act.

The second point urged is the question whether in the circumstances of this case the petitioner should be declared a registered firm under Section 26-A of the Act. The Assistant Commissioner refused to entertain the appeal against an order refusing registration, as no such appeal is provided for by Section 30 of the Act. It is true that the law has been altered by an amendment of the section made in November 1933; but we have held in other similar references under Section 66 of the Income Tax Act, that according to Section 30, as it stood before the amendment in November 1933, no appeal lay against an order refusing registration under Section 26-A of the Act and no reference is therefore maintainable to this Court arising out of the rejection by the income-tax authority of an application to register under Section 26-A.

Mr. Kishen Dayal has in this connection invited our attention to *Bulchand Keshavdas* v. *Commissioner of Income Tax, Bombay*, and has urged on the authority of this ruling that a question of law is involved. He has also referred to *Ramlal Murlidhar, In re*; *Haridas Premji* v. *Commissioner of Income Tax, Bengal* and *Kikabai* v. *Commissioner of Income Tax, Central Provinces*. In these three latter cases the Income Tax Commissioner appears to have referred *suo motu* to the High Court, the question arising out of the refusal of the income tax authorities to accept an application for registration under Section 26-A. The question of the maintainability of such a

reference under Section 66 of the Act was not considered in these three cases and accordingly no argument in favour of the maintainability of such a reference can be based on these authorities. It was, however, held in *Bulchand Keshavdas* v. *Commissioner of Income Tax, Bombay*, that a question of law does arise out of a refusal of the Assistant Commissioner to accept an application for registration. The learned Judicial Commissioner observed that in the particular case before him " a question of law did arise out of the order of the Assistant Commissioner as his assessment was on the assumption that the assessee firm was an unregistered firm. It may be that no appeal was given by the Act from an order refusing to register a firm, but on the analogy of appeals from decrees in civil suits there is no reason why objection could not be taken to the order of refusal in the appeal against the assessment which was founded on it." Mr. Kishen Dayal adopts a similar argument in this case and urges that in an appeal from a final assessment the Assistant Commissioner should have gone into the question whether the petitioner had been assessed as a firm or an association of individuals and that his refusal to do so raises a question of law on which the Commissioner should now be directed to state a case for reference to this Court.

In our opinion, however, the Income Tax Act cannot be interpreted in the same way as the Civil Procedure Code. The Income Tax Act is a special enactment which gives the authorities specific powers for purposes of assessment and these powers can only be attacked in the manner prescribed by the Act. Section 30 provides for appeals against certain specific orders and it necessarily follows in our view that orders passed under sections which are not mentioned in Section 30, are not appealable and are therefore final in the sense that they cannot be re-opened at any subsequent stage. We disagree with the proposition that an appeal against the final order of assessment justifies the Income Tax Commissioner in re-opening by way of reference to us decisions relating to the method of assessment, which according to the scheme of the Act, are final, merely because the assessment may be founded upon them. We adhere therefore, to our previously expressed view that under Section 30, before it was amended in November 1933, it was

not open to the Commissioner to refer to us under Section 66 a question arising out of a refusal to register a firm under Section 26-A because the order was, at that time, not appealable under Section 30, and therefore final.

We dismiss the application with costs.

Application dismissed.

[In the Court of Appeal.]

HEASTIE *v.* VEITCH & CO.

Lord Hanworth, M.R., Slesser, L.J., Romer, L.J.

July 20, 1933, Nov. 29, 1933.

Income Tax—Partnership—Premises Owned by One Partner—Rent Paid to him by Partnership—Partnership Deed—Rent More than Schedule A Assessment—Rent a Deduction in Computing Profits of Partnership for Schedule D Assessment—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sched. D, Rules Applicable to Cases I and II, Rule 3 (c); Rule 5, Sub-Rule 1: Rule 10—Finance Act, 1926 (16 & 17 Geo. 5 c. 22), Sched. IV.

The senior of two partners who carried on business as chartered accountants in premises owned by him received, in accordance with the provisions of the partnership deed, an annual rent, which was found by the Commissioners for the Special Purposes of the Income Tax Acts to be a fair and proper rent for the premises. The annual value of the premises for the purpose of Schedule A assessment was less than the actual rent. On a claim by the partners that the amount of the rent was a proper deduction in arriving at their profits for the purposes of assessment to income tax under Case II of Schedule D: Held, *by the* Court of Appeal (*reversing* Finlay, J.), *that the claim was justified by the Commissioners' finding of fact, and therefore that the larger sum was properly deducted.*

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The facts were set out by FINLAY, J., in his judgment as follows, and are referred to more fully in the judgment of LORD HANWORTH, M. R.:

"The case is a peculiar one and arises in the following way. There was a partnership of two men carrying on business as accountants. They made substantial profits and were assessed as a partnership. The business was carried on in premises in the City of London which were assessed under Schedule A at a figure of £ 705. Those premises belong to the senior partner, Mr. Veitch, and in the deed of partnership there was a provision whereby Mr. Veitch was to allow the firm to use these premises as the premises for carrying on the business of the partnership, and he was to be paid for that a rent of £ 1,250 . . . I suppose the divergence—certainly a remarkable divergence—between the Schedule A assessment of £ 705 and the rent of £ 1,250 is due to the circumstance—and we have had several cases about it lately—that in London, the annual value being computed in a special way, there is apt to be considerable divergence between rent and annual value, a difficulty which was prominent in the Salisbury House case and cannot arise except in London."

Upon those facts the partners contended that for the assessment of their partnership profits for income-tax they were entitled to treat the sum of £ 1,250 as a fair deduction.

The Crown contended that the Schedule A assessment of £ 705 was the only deduction which could be allowed, and that the increased rent paid to Mr. Veitch was merely an adjustment of profits between the partners.

The Special Commissioners having found as a fact that the rent charged to the partnership was fair and proper, and therefore that the contention of the partners was justified, the Crown appealed.

The Attorney-General (*Sir Thomas Inskip, K. C.*), *J. H. Stamp* and *R. P. Hills*, for the appellant.

T. Donovan, for the respondent.

FINLAY, J., stated the facts, as set out, and continued: Now, turning to the Act, the general position is quite clear. There is an express rule, Rule 5, Cases I and II, which authorises the

deduction of the annual value of lands occupied for the purpose of trade. There is no difficulty about that at all. It is clear, and it is not to be questioned, that to that deduction the respondents here are entitled. But there is also a rule—and a dispute arises with regard to this—which in effect is a prohibition, but it has been said by a great authority that though in form a prohibition it is really an allowance, and in effect it allows, disbursements incurred wholly and exclusively for the purpose of the business. Now here, if this rent which is found to be a fair and proper rent were paid to an outsider, it would, I think, be deductible, and deductible as a disbursement, and it would be immaterial that there was a wide divergence between the disbursement, that is, the rent, and the annual value. That would afford no answer if it were paid to an outsider. But here what is said—and I have come to the conclusion correctly said—on behalf of the Crown is that that cannot apply where you are dealing with a partnership and where two partners, so to speak, pay and one receives. Here what really happened was this, that a partner provided what is, I suppose in effect, capital: he provided premises for the use of the firm. If he had provided capital in the form of money, it would be clear beyond any doubt that the sum paid in respect of that could not form a deduction. So I suppose if he provided a motor car, or if he gave services of a special character, or any of those matters, it illustrates the situation which I think is clear. I put it to counsel, who assented—and I do not imagine it can be disputed—that if you have a salaried partner that salary is not a deduction before computing the profits of the partnership, although it is otherwise, of course, if it is the case of a company paying salaries to its servants and officials.

Accepting here, as I need hardly say I accept absolutely, the finding of the Special Commissioners that this was fair and proper rent, I have come to the conclusion that, none the less, the deduction must be restricted to the annual value. The reason for that is that while the annual value can of course be got, and got under Rule 5, this cannot be got as a disbursement under Rule 3, because it is simply a payment made by the two partners to one of them, and made in respect of special matters, in this

particular case business premises which have been supplied for the use of the firm by that partner.

On that ground, though not without hesitation, I have arrived at the conclusion that, accepting fully the finding of fact of the Commissioners, none the less, on the ground which I have tried to state fairly, their deduction cannot stand. The result is that the appeal in this case will be allowed, with costs.

The partners appealed.

Needham, *K. C.*, and *T. Donovan*, for the appellants.

The Attorney-General (*Sir Thomas Inskip*, *K. C.*), *J. H. Stamp* and *R. P. Hills*, for the Crown.

LORD HANWORTH, M. R.—This seems, to my mind, a very plain case. It is necessary just to state the facts, because the propositions of law are not in dispute. It seems that one of these partners, the senior partner, acquired some premises in March, 1926, for £ 10,000, premises which were leasehold, with a ground rent of £ 460. On September 19, 1928, a deed of partnership was entered into to regulate the business relations between the partners in respect of a business which had been carried on before but in respect of which there had been no actual partnership deed. Under the terms of the partnership deed, these premises, of which the senior partner was the owner, were to be the place where the partners were to carry on their business, and it was provided by the partnership deed that, entirely at the will and sole discretion of the senior partner and so long as he should deem fit, the partnership should use the premises and pay to the senior partner in respect of the use of the premises £ 1,250 per annum for rent.

That is how the matter stood with regard to these premises. Now, there was a provision in the partnership deed that the capital of the partnership should be brought in exclusively by the senior partner and the amount of his capital should be the sum shown to the credit of the senior partner in the balance sheet, dated March 31, 1928, which was the date in the year up to which the balance sheet was made out; and also such further sums as the senior partner from time to time in his sole discretion sould deem necessary to bring in. Of course, it is not a conclusive matter, because one has always to go to the substance of the

matter and not merely to accounts but so far as the balance sheet we have before us is an indication it would seem that the capital of the senior partner was £2,700 at March, 1931, and no more, but it does appear from that that he still was entitled to receive the rent for that year of £ 1,250 which would seem to indicate that the premises were still held by him as they had been before the partnership deed, and that nothing had intervened to make the sum of £ 1,250 per annum otherwise than payable out of the partnership assets.

There is no doubt about it—and the Attorney-General does not contend otherwise—that if these premises had belonged to some entirely independent owner, the partnership would have been entitled to pay that owner £ 1,250 and that sum would have been deductible as a proper outgoing in ascertaining the profit and gains, in accordance with the indication that is given in rule 3 (*c*) of the Rules applicable to Cases I and II of Schedule D. There is no doubt about that. On the other side, there is no doubt about this,that if and so far as capital is borrowed by the firm, borrowed from whomever you please, any annual interest or other annual payment in respect of that capital so borrowed and paid out of the profits and gains is a deduction which definitely is forbidden in computing the annual profits and gains under the same Rule 3 (*l*). What is said here is that although in form it is a payment for rent and a proper payment for rent, as it would be to a wholly outside person, this sum paid to the partner was really a payment made to him in respect of capital which he brought in; that he brought in a sum in the form of premises, but none the less it was a sum which may be treated as being converted into capital of £ 10,000, and so far as he was paid £ 1,250 that was a deduction which was forbidden under Rule 3 (*l*). We have, therefore, really to come to the conclusion on which side of the line does this fall: was it a payment for rent, or was it a payment for capital? The Commissioners said it was proved before them—and they are the right persons for estimating the facts—that "the rent of £ 1,250 was a fair and proper rent for 9, Coleman Street. It was in fact the rent which the senior partner was asked to pay by the previous owners in 1926 if he decided to rent the premises instead of purchasing the leasehold interest." They have come to the conclusion definitely

that they accept the view that this story told in the partnership deed was a true story. I quite agree that the matter is not concluded as a question of fact, but it is open to review as a question of law, because it is a mixed question of fact and law, and we have to construe and determine what is the result of Clause 4 of the partnership deed. But I am prepared to give very considerable weight to the conclusion reached by the Commissioners, who are quite within their province in telling us that the £ 1,250 was a fair and proper rent for these premises. Under those circumstances, I cannot see any evidence whereby one can turn this habitation of the partnership into money and treat it simply as money—treat it as borrowed capital. It appears to me that it stands, as the Commissioners have found, as being the habitation charged at a proper rent to the partnership. Therefore, the decision of the Commissioners must be restored and the appeal allowed, with costs here and below.

SLESSER, L. J.—I agree. The learned Judge has refused to allow this rent to be deducted under Rule 3 of the Rules applicable to Cases I and II, because he says it is simply a payment made by the two partners to one of them. I think that is an over-simplification of the relation between these people, as found by the Commissioners and as it appears from the deed that is before us. As I view this thing—and it is the view taken by the Commissioners (though, of course, it is a matter which, once it is held that it is a *bona fide* transaction, is one of law rather than of fact, as to what the deed means)—it seems to me it is an ordinary landlord and tenant agreement in which one of the partners happens to be the landlord and the partnership are the tenants. There is an obligation to pay rent, and a right on the part of the landlord to determine the transaction at his discretion, and there is an obligation on the partnership to pay such things as repairs and the like. Such a transaction appears to me properly to be described as " rent " within the meaning of Rule 3 (*c*). If that conclusion is properly arrived at, that these moneys were paid as rent, then I think that concludes the matter. I would only add that the Attorney-General has argued difficult cases about complications which may arise with regard to the payment of salaries and the introduction of capital into the firm. With regard to salaries, those are the cases, as I understand,

where it is held that the partner cannot be treated as receiving a salary where money is paid to him in respect of the partnership business in one form or another. I am far from saying that, if a payment were made to a partner for something altogether disconnected with the partnership business as such, he might not be entitled strictly to remuneration on an independent contract. We have not to consider that case. As regards interest upon capital, that is expressly provided for, as my Lord has said, in Rule 3 (*l*). It therefore follows that this satisfies all the requirements of the section, and the deduction is therefore proper.

Romer, L.J.—I agree. I think that the answer to the argument advanced on behalf of the Crown, based on an analogy, or suggested analogy, between this case and that of services rendered by the partner to his firm, is that the services so rendered are rendered as a partner. Where two persons agree together to carry on a business or a profession in partnership, it is no more possible, in ascertaining the profits of that business or partnership for the purposes of Schedule D, to deduct the salary paid to one or both of them for the work they have done in carrying on that business than it would be for a professional man to carry on a business on his own account and by himself to deduct something which he thought was equivalent to the value of his services rendered to himself.

But it is not the fact that you can never, in ascertaining the profits of a partnership, deduct something paid to one of the partners. An illustration I ventured to give during the argument is this: suppose two people are carrying on business in partnership as hotel proprietors, and it is necessary for the purpose of carrying on that hotel, that business, that they should be supplied from time to time with wine, and suppose one of the partners is carrying on a wholly independent business on his own account in the wine business and supplies wine to the partnership, it would be idle to suggest, would it not, that for the purpose of ascertaining the profits of the hotel you could not deduct the sums paid to the partner who was the wine merchant. The fact that such a deduction would be permissible is, I think, made clear by Rule 10 of the Rules applicable to Cases I and II,

which says that for the purposes of taxation under Schedule D a partnership is treated as a separate entity from individual partners composing the firm. In the present case it appears to me that the premises were supplied for the use of the partnership by the partner who owned them, not in his capacity of partner at all, but in his capacity of landlord of the premises. Now if it were the fact that interest on capital brought in by the partners could not be deducted for the purpose of ascertaining the profits of the partnership business under Schedule D, because capital was brought in by a partner, whereas in the case of capital brought in by an outsider—advanced to the partnership by an outsider—the interest on the capital could be deducted, I should agree with the contention on the part of the Crown. As I understand it, the reason why interest is not deductible in such a case —that is to say, interest on capital brought in by a partner for the purpose of ascertaining the partnership profits—is because Rule 3 (*l*) prevents the deduction of interest in any case.

For these reasons, it appears to me that this appeal should be allowed.

Appeal allowed.

Solicitors.—Maxwell, Batley & Co., for taxpayers; *Solicitor of Inland Revenue*, for the Crown.

[In The Nagpur Judicial Commissioner's Court].

NATHU SAO

v.

COMMISSIONER OF INCOME TAX, C. P. and BERAR.

Staples and Niyogi, A. J. Cs.

October 10, 1934.

Income Tax—'Hindu Undivided Family'—Single Male Member and Widows of Coparceners—Whether Constitute Undivided Family—Jains, Whether Hindus—Indian Income Tax Act (XI of 1922), Sections 3 and 14.

Where a Hindu lives jointly with the widows of deceased coparceners they constitute a Hindu undivided family for the purposes of assessment to income tax. The fact that there is only one male member is immaterial.

Jain families should be regarded as Hindu families for purposes of income tax in the absence of evidence of custom or usage showing that they are not governed by the rules applicable to Hindu families.

Cases referred to:

AMABAI *v.* GOVIND [1899] (I.L.R. 23 Bom. 257).

BACHEBI *v.* MAKHANLAL [1880] (I.L.R. 3 All. 55).

BHAGWAN SINGH *v.* MST. KEWAL KUAR [1927] (I. L. R. 8 Lah. 360).

CHOTEY LAL *v.* CHUNNO LAL [1878](L.R. 6 I.A. 15).

VEDATHANNI *v.* COMMISSIONER OF INCOME TAX, MADRAS [1933] (1933 I.T.R. 70; I.L.R. 56 Mad. 1).

Case stated by the Commissioner of Income Tax, C. P. and Berar under Section 66 (3) of the Income Tax Act (XI of 1922) Mis. Judicial Case No. 64-B of 1932.

D. N. Chowdhary, for the Crown.

D. W. Kathalay, for the assessee.

ORDER.—On the application of Seth Nathusao made under Section 66 (3) of the Income Tax Act (XI of 1922) this Court by an order on 29th July, 1932 directed an issue of requisition to the Commissioner of Income Tax requiring him to state the case on 3 questions, which were as follows:—

(1) Is not the assessee who is a member of the Jain community governed by the Hindu law as to joint family?

(2) Are not the assessee and his mother and widowed aunt members of an undivided family, and

(3) Can adverse inference be drawn in the absence of evidence to the contrary?

In accordance with that requisition the Commissioner of Income Tax has submitted a statement of the case on the foregoing 3 questions.

2. The facts of the case are simple. The assessee is a member of Lad Vaish community and is a Jain. He claims to be governed by the Hindu law and contended that his widowed mother and widowed aunt who lived with him, constituted a

Hindu joint family. The assessee was granted time to produce evidence to substantiate his contention. He having failed to do so, his contentions were negatived.

3. As to the contention involved in question (1) namely that the Jains are governed by Hindu law relating to joint family, this Court in its order dated 29—7—1932 held that the ordinary Hindu law applies to Jains in the absence of proof of custom or usage to the contrary, on the authority of a Privy Council decision reported in *Chotey Lal* v. *Chunno Lal* which was followed in *Bachebi* v. *Makhan Lal* and *Amabai* v. *Govind.* The Commissioner of Income Tax submits to the ruling of this Court on this question.

4. As to question No. 2, it is contended on behalf of the Commissioner of Income Tax that in the absence of evidence to prove that the assessee's father and uncle were coparceners, it could not be inferred that the assessee's mother and aunt were members of an undivided Hindu family. Throughout the proceedings it seems to have been conceded that the assessee's father and uncle were coparceners. All that was contended was that the assessee and the female members of his family entitled to maintenance could not in law constitute a joint family. In fact the admission of these persons constituting a joint family is implicit in the other admission made by the Commissioner of Income Tax that the family members are entitled to maintenance. The obligation to maintain the widows of deceased coparceners arises from the fact that the surviving male member is in possession of the family property including the shares of the deceased coparceners which devolved on him by survivorship. See *Bhagwansingh* v. *Mst. Kewal Kaur.* Lately the question whether a single male member living jointly with the widows of deceased coparceners entitled to maintenance from him, constitute a joint Hindu family arose incidentally before a Special Bench of the Madras High Court, and it was answered in the affirmative, See *Vedathanni* v. *Commissioner of Income Tax, Madras.* There is a clear distinction between a coparcenary and a Hindu joint or undivided family. As noticed by Mayne in his *Hindu law*, page 347, para 271, a coparcenary consists of male members who are entitled to demand partition and such a coparcenary ceases to exist when by deaths among the male members the family is

reduced to one sole surviving male, but the family (?) survives, even where there is only one male member left in the family burdened with the obligation to maintain the widows of the deceased coparceners. The liability to pay maintenance to the widows of the deceased members of the coparcenary is the criterion to determine whether the family is divided or undivided. Suppose there are two Hindu Brothers *A* and *B* constituting a coparcenary. It they partition their shares, and one of them dies after the partition, the surviving member will be under no obligation to maintain the deceased brother's widow. On the other hand, if one of the brothers dies in a state of jointness with his brother, his widow will undoubtedly have the right to be maintained by the surviving brother of her husband. The capacity of any one of the widows to introduce a new member into the family by adoption also goes to show that the widows are regarded as members of the joint family. It must therefore be held that the assessee Seth Nathusao along with his widowed mother and widowed aunt constitute a Hindu undivided family. The question No. 2, must therefore be answered in the affirmative.

5. As to question No. 3, it may be broadly stated that the burden of proving the existence of joint family is on the person pleading it. In the present case, however, the Commissioner of Income Tax having admitted the fact that the widows were entitled to maintenance, the existence of coparcenary between the assessee's father and uncle must be deemed to have been impliedly admitted. A fact which is admitted, needs no proof, and consequently there was no necessity for the assessee to lead any evidence.

6. The result is that the assessee succeeds and the Commissioner of Income Tax will pay his costs of these proceedings. Pleader's fee Rs. 25.

Reference answered.

[IN THE HOUSE OF LORDS.]

ASSAM RAILWAYS AND TRADING CO.

v.

COMMISSIONERS OF INLAND REVENUE.

Lord Blanesburgh, Lord Warrington of Clyffe, Lord Atkin, Lord Thankerton and Lord Wright.

June 12, 14, 15. July 24, 1934.

INCOME TAX—DOUBLE TAXATION—ENGLISH COMPANY—PROFITS MADE IN INDIA—INDIAN INCOME TAX ON PROFITS LESS INTEREST PAID ON DEBENTURES—UNITED KINGDOM INCOME TAX ON WHOLE PROFITS—CLAIM TO RELIEF ON WHOLE SUM—INCOME TAX ACT, 1918 (8 & 9 GEO. 5. c. 40), CASE I, SCHED. D—FINANCE ACT, 1920 (10 & 11 GEO. 5 c. 18), SECTION 27—FINANCE ACT, 1927 (17 & 18 Geo. 5 c. 10), SECTION 46, SCHED. V, PART II 2 (1).

The appellants were an English company incorporated and resident in England. They carried on a composite business in India. The whole of their profits of £186,750 for the year ending April 5, 1929, arose in India and were charged to United Kingdom income tax under Case I of Schedule D of the Income Tax Act, 1918. For the same year they were charged to Dominion or Indian income tax on £129,365 only. The difference arose from the fact that in India £42,500, paid by the appellants for interest on debenture stock, was allowed as a deduction from the gross profits, and the profits from certain tea gardens were excluded from the account. This course was not allowed in England. Section 27 of the Finance Act, 1920, provides that any person who has paid United Kingdom income tax on any part of his income, and proves that he has paid Dominion income tax in respect of the same part of his income, shall be entitled to certain relief from United Kingdom income tax:—Held, *that the Indian assessment was not an assessment on the whole amount of the profits of £186,750, and did not therefore exhaust the taxable capacity in India of the whole of these profits; where definite amounts were in question the word "paid" in Section 27 meant paid in fact and could not be applied to those definite amounts, which were simply in India deducted from the profits assessable, as not being liable to tax at all. The element of double taxation*

did not exist in regard to those parts of the appellants' income excluded from taxation in India.

Observation of FARWELL, L. J., *in* R. *v.* YORKSHIRE (WEST RIDING) COUNTY COUNCIL; ATT.-GEN. AND BOARD OF EDUCATION, *Ex parte* [1906] (75 L. J. K. B. 933; [1906] 2 K. B. 676) *approved.*

EASTMAN PHOTOGRAPHIC MATERIALS CO. *v.* COMPTROLLER-GENERAL OF PATENTS, DESIGNS, AND TRADE MARKS [1898] (67 L. J. Ch. 628; [1898] A.C. 571) *distinguished.*

Decision of the COURT OF APPEAL (1934 I. T. R. 9; 102 L.J.K.B. 702; [1933] 2 K. B. 576) *affirmed.*

Cases referred to:

EASTMAN PHOTOGRAPHIC MATERIALS CO. *v.* COMPTROLLER-GENERAL OF PATENTS, DESIGNS, AND TRADE MARKS [1898] (67 L.J. Ch. 628; [1898] A.C. 571).

GORHAM *v.* EXETER (BISHOP) [1864] (Moore's Report of Case (1852) ed., p. 462).

HEYDON'S CASE [1584] (3 Co. Rep. 7 (*a*)).

R. *v.* YORKSHIRE (WEST RIDING) COUNTY COUNCIL; ATT.-GEN. AND BOARD OF EDUCATION, *Ex parte* [1906] 75 L. J. K. B. 933; [1906] 2 K. B. 676; reversed in H. L. *sub nom.* ATT.-GEN. *v.* YORKSHIRE (WEST RIDING) COUNTY COUNCIL; GRENSIDE, *Ex parte* [1906] (76 L. J. K. B. 97; [1925] A. C. 29).

ROLLS-ROYCE, LTD. *v.* SHORT [1925] (94 L. J. K. B. 849; 10 Tax Cas. 59).

Appeal from an order of the Court of Appeal, dismissing an appeal by the appellants from an order of the King's Bench Division, whereby an appeal by the appellants upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the decision of the Commissioners confirmed.

The material facts are set out in the headnote and are to be found fully stated in the judgment of LORD WRIGHT.

Latter, K. C., and *Cyril L. King*, for the appellants.

The Attorney-General (*Sir Thomas Inskip, K. C.*), and *R. P. Hills*, for the Crown.

The arguments sufficiently appear in the judgment of Lord Wright.

Their Lordships took time to consider their judgment.

July 24.—LORD BLANESBURGH.—My Lords, I have found that the more the question raised by this appeal is considered the greater is the difficulty it presents It is only after close examination that the ambiguities of Section 27, sub-Section 1 of the Finance Act, 1920, become apparent. The section suggests no serious problem when the "part" of the assessee's income brought into charge for the year of assessment to United Kingdom income tax is, in its amount, equal to "the same part" of his income brought into charge for the same year to Dominion income tax. Nor is the difficulty serious when the section has to be applied to a case in which the "part" of the assessee's income brought into charge for the purpose of Dominion income tax is in its amount, greater than that brought into charge in the United Kingdom. The extent of the relief from United Kingdom income tax given by the section is in each of these cases not doubtful. The assessee in respect of the whole of the sum representing the "part" of his income which has been brought into charge in the United Kingdom is entitled to the relief given by the section, and that relief will operate to discharge him to the prescribed extent from the burden of a double taxation, one in the Dominion and the other in the United Kingdom.

So far, the relief granted is relief from a double taxation, and nothing more. The real difficulty of the section arises when it has to be ascertained, as in this instance it has, whether that still remains its purpose and result when its provisions have to be applied to a case in which the "part" of the assessee's income brought into charge for the purpose of Dominion income tax is in amount less than that brought into charge in the United Kingdom. Is the section, in this case also effective only to relieve the assessee from payment of double income tax to the prescribed amount and to the extent to which he would otherwise be required to make it ? or is the section, in this instance alone, operative in quite a different way, so that when the assessee has met every claim in respect of the "part" of his income charged to Dominion income tax, however small in amount that "part" may be,

he is, by the section, relieved in respect of the whole amount, however large, which represents the same "part" of his income brought into charge in the United Kingdom. In other words, are the appellants here entitled, as they contend, to relief under the section in respect of the whole of their business income brought into charge in the United Kingdom, irrespective of what is brought into charge in India, or, as the Attorney-General contends, only in respect of so much of that income as has been or will be charged to income tax there.

On this point I feel constrained, on consideration, to say that the actual language of the section is not unfavourable to the appellants' contention. Not adverting for the moment to the question whether the word "part" as used in the section does or does not connote a sum of money brought into charge both in the United Kingdom and, in this case, in India, that word does certainly, I think, point to the source from which the income is derived, "the part" and "the same part" being brought in the section into relation with each other by their identity of source. The word appears to me to denote what may be described as a "compartment" of the assessee's total income, if I may select, as a more pregnant term, one suggested by its similarity in sound. Then again, it is not, I think, unfavourable to the appellants' contention that, in order to entitle an assessee to relief, it is in terms enough that he has paid Dominion income tax "in respect of" that same "compartment" of his income. While there is nothing to indicate that the effective compartment must correspond in amount to the United Kingdom counterpart, rather the reverse, yet the extent of relief is, so far as words are concerned, expressed to be invariable. It is always relief at a prescribed rate "from United Kingdom income tax paid or payable by him on that part of his income." That is, may it not be said, from the whole of that tax.

I have been moved by these considerations, which seem to me to have weight. But they are not to my mind final, nor do they, I think, outweigh the reasoning which leads to the conclusion that the section in every case where it has to be applied is really directed against a charge *pro tanto* of double income tax upon any portion of any "compartment" of the assessee's total income, and that there is no sufficient indication in the language

employed necessitating the conclusion that any further relief is contemplated or provided for.

Accordingly, while conscious of difficulty, I am ready to accept the construction in that sense placed upon the section by by my noble and learned friends LORD WARRINGTON OF CLYFFE and LORD WRIGHT in their judgments, which I have had the advantage of reading and which I accept.

With them I agree that this appeal should be dismissed, and I move your Lordships accordingly.

LORD WARRINGTON OF CLYFFE (*read by* LORD ATKIN).—This is an appeal from an order of the Court of Appeal (LORD HANWORTH, M. R., LAWRENCE L.J., and SLESSER, L.J.), dated July 11, 1933, dismissing an appeal by the present appellants from an order of the King's Bench Division (FINLAY, J.), dated February 14, 1933, which affirmed a decision of the Special Commissioners upon a claim by the appellants for relief from United Kingdom income-tax.

The question depends upon the true construction and effect, in the events which have happened, of Section 27 of the Finance Act, 1920. That section, so far as it is material to the solution of the question, is as follows: sub-Section 1: "If any person who has paid by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows:—" There follow provisions for the determination of the rate as to which no question arises in the present case. Sub-Section 8 contains the following definitions: "(b) The expressions 'United Kingdom income tax'........mean........income tax.... ...chargeable in accordance with the provisions of the income tax Acts. (c) The expression 'Dominion income tax' means any income tax charged under any law in force in any Dominion, if that tax appears to the Special Commissioners to correspond with United Kingdom income tax."

The Dominion income-tax in the present case is that charged under the law of India, and there is no question that it falls within the above-mentioned definition. The appellants are an English company incorporated and resident in England. They carry on a composite business in India. With some immaterial exceptions of trifling amount, the whole of their income for the two years ending April 5, 1929, and April 5, 1930, arose in India and was charged to United Kingdom income tax as profits of trade under case I of Schedule D. The claim to relief was made in respect of several years, but the year ending April 5, 1929, may be taken as typical of the rest, and in fact has alone been the subject of actual decision in the Courts below.

The appellants were charged to United Kingdom income tax for that year on their profits from India on £ 186,750. For the same year they were charged to Dominion income-tax on £ 129,365 only. The difference arises from the fact that in India certain debenture interest was allowed as a deduction from the gross profits, and the profits from certain tea gardens were excluded from the account. This course was not allowed in England. There were other divergencies in the two systems of taxation which combined to make up a further excess of £ 6,542 in the United Kingdom profits, which when also so excluded reduced the amount of £ 186,750 to £ 129,365, the amount assessed to Indian income-tax.

The Court of Appeal has held that on the true construction of the section relief from United Kingdom income-tax can be allowed on £ 129,365 only, that being in their opinion that part of the appellants' income in respect of which they have paid Dominion income-tax. The question depends on the true construction of the section in question, read, of course, in connection with, and as part of the Income Tax Act as a whole, and in accordance with the usual rules of construction. Counsel for the appellants, indeed, insisted that he was entitled to support his argument on construction by referring to the report of the Royal Commission on Income Tax published in 1920. On this point I have read and considered the opinion about to be delivered by my noble and learned friend LORD WRIGHT. With his opinion I concur, and have nothing to add to what he has said.

On the question of construction the contention of the appellants was that "part of the income" refers only to the source from which the income is derived. The source in this case was the Indian business of the company, and it was contended that, inasmuch as the whole of that income was taxed to United Kingdom income-tax in the sum of £186,750, it is in respect of that sum that relief should be given. I cannot agree with this contention. The word "part" is not in any sense a word of art with a peculiar meaning derived from the subject-matter in connection with which it is used. We are here dealing with a sum of money referred to as income. "Part" of a sum of money means in its ordinary signification so many pounds, shillings and pence out of a larger amount. If the income is £100, a smaller sum, say £50, would properly be described as a part thereof.

In the present case the part of his income on which the taxpayer has paid tax in England is £186,750. In India he has paid tax on a smaller part numerically of the same income. To obtain relief he has to prove that he has paid Dominion tax on the same part of his income as that on which he paid United Kingdom tax. He can only prove this in respect of the smaller sum. I can see no reason why for the purpose of identification any other meaning should be given to the word "part" than the numerical meaning. "Double taxation" is not in terms mentioned in the section, but it is obvious that the object of the provision is to obtain *pro tanto* the avoidance of that result. The tax-payer has paid Dominion income-tax in respect of £ x of his income; he is entitled to relief in respect of £ x part of the same income and to no more. Some criticism was directed to the use of the word "on" in relation to United Kingdom income-tax and of the words "in respect of" in relation to Dominion income-tax, but I see no point in this; the two expressions mean virtually the same thing.

The case of *Rolls-Royce, Ltd.* v. *Short* was referred to by the appellants' counsel, who relied upon certain observations of my own as supporting his present contention. I do not see that this is so. Those observations, which I have read, must be understood as referring to the case then before the Court, and so read they have no bearing on the present case. I may add, however,

that I can detect in them no divergence between my own view and those of my learned brethren in the Court of Appeal.

The present case is a simple one. Others may arise in which further complications will have to be dealt with. That is no reason why the simple solution in the present case should not be the right one. On the whole I agree with the conclusion of the Court of Appeal, and am of opinion that this appeal should be dismissed.

LORD ATKIN.—I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend LORD WRIGHT, and I agree with that opinion and the opinion I have just read.

LORD WRIGHT.—I am authorised to say that my noble and learned friend LORD THANKERTON agrees with the opinion I am about to read. The question to be decided in this appeal is what is the extent of relief in respect of income tax to which the appellants are entitled under Section 27, sub-Section 1 of the Finance Act, 1920, as amended by Section 46 and the Fifth Schedule, Part II 2 (1) of the Finance Act, 1927. The facts are simple: the appellants are a joint stock company incorporated and registered in England; their business is carried on in Assam and consists of running a railway, working coal mines, timber concessions and other undertakings, including a tea plantation. Not the whole but almost the whole of their income for the two years which are here in question, having been taken as typical, that is, the years ending on April 5, 1929, and April 5, 1930, arose in India. That income was duly charged to United Kingdom income tax under Case I of Schedule D in the First Schedule of the Income Tax Act, 1918.

It will be sufficient in order to illustrate the point at issue to take the figures for the year 1928-1929. No difficulty arises in this case in comparing the figures for the United Kingdom tax and for the Indian tax respectively. In both assessments the computation of profits is based on those of the preceding year, the period taken in the accounts being that ending on March 31, 1928. A trifling sum of £ 58 was earned by the appellants in England for transfer fees; this having been deducted, the assessment of profits for income tax in the United Kingdom came out at £ 186,750; but the same profits were assessed to income tax

in India at £ 129,365. The appellants claimed relief at 2s. in the pound on the former sum; the Special Commissioners granted relief in respect of £ 135,907; the difference between the latter figure and £ 129,365 is £ 6,542. The Court of Appeal, in confirming (in substance) the ruling of the Special Commissioners, took the view (rightly as I think) that the true amount on which relief should be given was £ 129,365, and I shall proceed on the basis of that figure, though no claim is made by the respondents to have the figure of £ 135,907 altered.

In effect the position is that the appellants have paid or become liable to pay for United Kingdom income tax for the year 1928-1929 on an assessment on part of their income of £ 186,750; but in respect of the same income for the same year have paid in India on an assessment of £ 129,365. The difference between the two assessments is in the main due to the fact that in India the sum of £ 42,500 for debenture interest was allowed as a deduction from the profits, whereas in the United Kingdom no such deduction was allowed; in addition in India profits from a tea garden owned by the appellants were for some reason not taken into account, whereas these profits were included in the profits under the United Kingdom assessment. As already indicated, there were other similar, but minor differences in the assessments which it is not necessary here to consider.

The rival contentions may be thus summarised. The appellants claim that though the Indian assessment is only at the figure of £ 129,365 it is an assessment on the whole amount of the profits of £ 186,750; in other words, it exhansts the taxable capacity in India of the whole of those profits, so that the appellants have paid Indian income tax on the whole of that sum, and hence are on that footing entitled to income tax relief under Section 27 of the Act of 1920 on the whole of that sum. The respondents, on the other hand, contend that double income tax has only been paid on £129,365, and no more within the meaning of the section, and hence that it is only on that sum that relief is claimable.

The question, which is by no means free from difficulty, depends on the true construction of the words of the section, read in connection with the Income Tax Act as a whole and in accordance with the usual rules of construction. Counsel for the

appellants sought to introduce into his argument certain recommendations from a report of a Royal Commission on income tax in 1920; he argued that, as the Act of 1920 followed these recommendations, it should be presumed that the words of the section were intended to give effect to them, and hence they could be used to show what was the intention of the Legislature in enacting the section. It would perhaps in this case be sufficient ground for rejecting as your Lordships did, this contention and refusing to look at the report, that it had not been used or referred to either before the Special Commissioners or before FINLAY, J., or the Court of Appeal. But on principle no such evidence for the purpose of showing the intention, that is the purpose or object, of an Act is admissible; the intention of the Legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate; as to this I agree with FARWELL, L.J., in *R.* v. *Yorkshire* (*West Riding*) *County Council*; *Att.-Gen. and Board of Education*, Ex parte, where he said (75 L.J.K.B., at p. 960; [1906] 2 K.B. at p. 717) "that the true rule is expressed with accuracy by LORD LANGDALE in giving the judgment of the Privy Council in the *Gorham Case* in *Moore*, 1852 edition, p. 462; 'We must endeavour to attain for ourselves the true meaning of the language employed' "—in the articles and Liturgy—" 'assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed.' " In this House, where the judgment of the Court of Appeal was reversed—*Att.-Gen.* v. *Yorkshire* (*West Riding*) *County Council*: *Grenside*, Ex parte—no reference was made to this point. It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible, and the report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted. Counsel relied on certain observations of LORD HALSBURY, L. C., in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* (67 L. J. Ch. at p. 631; [1898] A. C., at p. 575). The Lord Chancellor was there referring to the report of a

Commission that had sat to inquire into the working of the earlier Act, which had been superseded by the Act actually being construed by the House; but LORD HALSBURY refers to the report not directly to ascertain the intention of the words used in the Act, but because, as he says, "no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of the Commission." LORD HALSBURY, it is clear, was treating the report as extraneous matter to show what were the surrounding circumstances with reference to which the words were used, and which came within the principle stated by LORD LANGDALE. The rule is in principle analogous to the rules laid down in the four resolutions of the Barons of the Exchequer recorded in *Heydon's case* [3 Co. Rep. 7 (*a*)].

On the facts of the present case I am of opinion that the appellants fail in their contention. The section requires that the taxpayer should prove (1) that he has paid tax in the United Kingdom for any year on a certain sum which is part of his income; in this connection I do not think that the word "part" is used to exclude the whole, but merely to point to an ascertainable sum of income which is brought into question, (2) that he has paid tax in the Dominion "in respect of" the same part of his income for that year; here the words "in respect of" as contrasted with "on" do not, I think, involve any latent distinction, since the word "on" would be inapplicable to the "same . . . income" which becomes a separate taxable subject in the Dominion. The taxpayer then becomes entitled to relief. It seems clear that there must be a definite part of income brought into question, and that can only be expressed in a sum of money. As income *ex vi termini* must be expressed in a sum of money, the words "the same part of his income" must involve a comparison between two sums of money, which prove to be the same. The contention of the appellants is to the contrary; it is said on their behalf that the words "the same part of his income" refer solely to what is called the source, and that identity of amount is immaterial and does not come into question except for the purpose of ascertaining the rate of tax to be allowed for. I cannot agree with this argument. No doubt questions

of source, as it has been called, that is, such questions as where the income comes from, are essential to identify, so far as that aspect goes, what is taxed in the United Kingdom with what is taxed in the Dominion ; but in addition the income itself, that is, the amount of money, must also be identified. I think the words "the same part of his income" are apt to include both elements of comparison and identification. The facts here may be peculiar in that they present none of the complications which will often prevent a clear identification and comparison of the income on which United Kingdom tax is paid with that on which the Dominion tax has been paid. There may, for instance, be differences in regard to the year of charge, or in the method of computing the income for tax purposes ; thus in *Rolls-Royce Ltd.* v. *Short* the part of the company's income there in question paid no tax in the United Kingdom because such part was not taxable as the law then stood, no profits having been made by the company on their Indian business on the average of the three preceding years, whereas in India, as now both in India and the United Kingdom, tax was payable on the basis of the preceding year's income which by itself showed a profit ; hence though tax had been paid on the profit in question in India the foundation of a claim under Section 27 failed because the company had not paid or become liable to pay tax on those profits in the United Kingdom. Certain observations in that case are to be read in reference to its special facts. But there is no such discrepancy in the present case ; the appellants, having paid tax in the United Kingdom on £ 186,750, have not paid tax at all in India on two definite and separable amounts, parts of that sum of £ 186,750, namely, £ 42,500, the debenture interest and the sum representing the profits of the tea garden. On the words of the section it seems that appellants can only show double taxation in regard to £ 129,365 which is a part of the £ 186,750. In other words, I think that in such a case as this, where definite amounts are in question, the word "paid" in the sub-section means paid in fact, and cannot be applied in truth to these definite amounts, which are simply in India deducted from the profits assessable, as not being liable to tax at all. Accordingly, on the facts of this case, I do not think it is correct to say that the appellants have paid in India tax on the whole sum of

£ 186,750 so as to be able to claim relief on the whole. I reject the contention made on behalf of the appellants and based by them on the ground that the whole sum has been taxed to its full taxable capacity according to Indian law; the admissible deductions, it is said, amount simply to a method of assessment or computation of the entire profits, and not a mere immunity of certain items. No doubt there may be cases in which a reduction in the amount of the assessment in the Dominion may be consistent merely with a difference in computation, so that it may be said that the larger sum taxed in the United Kingdom ought to be regarded as taxed *in toto* in the Dominion by the smaller assessment, and that the taxpayer in that event has paid tax on the same part of his income taken at the larger figure both in the United Kingdom and in the Dominion. But I think that on the true view of the facts of the present case certain definite parts of income which are taxed in the United Kingdom are excluded from taxation altogether in India, so that the element of double taxation does not exist at all in regard to those parts of the appellants' income. In other words, in my judgment, the same part of their income on or in respect of which the appellants have paid double tax is not £ 186,750 but £ 129,365, and it is on that part alone of their income that they are entitled to relief.

In the result, I think the appeal should be dismissed.

Application dismissed.

Solicitors.—Taylor and Humbert, for the appellants; *Solicitor of Inland Revenue*, for the respondents.

[IN THE LAHORE HIGH COURT.]

SHER SINGH NATHU RAM

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Jai Lal, Dalip Singh and Skemp, JJ.

October 19, 1934.

INCOME TAX—HINDU UNDIVIDED FAMILY—ASSESSMENT AFTER PARTITION—SEPARATION OF MEMBERS WITHOUT PARTITION BY METES AND BOUNDS—EFFECT—' PARTITION IN DEFINITE PORTIONS '—MEANING OF—INDIAN INCOME TAX ACT (XI OF

1922), SECTION 25-A—INCOME TAX—ALLOWANCE OF DEDUCTION IN PREVIOUS YEAR—WHETHER BINDING IN ASSESSMENT FOR SUCCEEDING YEARS.

Section 25-A of the Indian Income Tax Act does not require actual partition of the family property by metes and bounds as a condition precedent to the recognition of a partition under that section. It is enough if there is a disruption of the family and a definite ascertainment of the shares of the different members composing the family. The words 'partitioned in definite portions' in the said section merely mean 'partitioned in definite shares.'

The mere fact that in a previous year an Income Tax Officer had allowed a claim does not bind the Income Tax Officer in a subsequent year.

Case stated by the Commissioner of Income Tax, Punjab, N. W. F. P. and Delhi Provinces under Section 66 (3) of the Indian Income Tax Act (XI of 1922) [Ref. No. 36 of 1934].

S. N. Bali and *Dev Raj Sawhney*, for the assessees.

J. N. Aggarwal, for the Crown.

DALIP SINGH, J.—By an order* made under Section 66 (3) of the Income Tax Act dated 13th July, 1933, this Court directed the Commissioner of Income Tax to draft a statement of the case of Messrs. Sher Singh Nathu Ram of Lahore and refer for the decision of the Court the following two questions, namely :—

(1) Whether Section 25-A of the Income Tax Act requires actual partition of the family property by metes and bounds as a condition precedent to the recognition of a partition under Section 25-A of the Income Tax Act ; and

(2) Whether the finding of the Income Tax Officer, that the money deposited with the assessee did not belong to certain ladies in whose names it stood deposited is supported by any evidence.

The learned Commissioner has accordingly drawn up a statement of the case and referred the two questions for decision to this Court together with his opinion thereon.

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* *Note*—The order referred to is reported in full in 1933 Income Tax Reports at p. 287.

The facts as stated by him are that the said firm, which had been assessed for some time as a Hindu undivided family, applied for assessment as a partnership on the ground that the family had disrupted and shares had been assigned in the business to the two brothers who were joint owners of the said firm. It was admitted, however, that the property had not been actually divided by metes and bounds, but it was stated that the shares of the brothers were equal, being half and half. The Income Tax Officer held that the partition claimed was not such a partition as came within the purview of Section 25-A and that therefore the assessee was still a Hindu undivided family and refused to consider the application for registration as a firm, which no longer lay. The Income Tax Officer disallowed a claim to interest paid on certain items which it was alleged were a gift by the deceased father of the assessees to their respective wives. He held that the accounts started in different years, which was unlikely if there had been a simultaneous gift, that the rate of interest paid was excessive, that the firm had a credit at the bank at much less interest than that charged, and hence these items were not proved to belong to the ladies in whose names they stood.

I may at once finish with the second question by remarking that this seems to me to be a finding of fact for which there is evidence as now stated by the Commissioner and the mere fact that in a previous year an Income Tax Officer had allowed the claim does not bind the Income Tax Officer in a subsequent year. I would therefore hold that the second question is not a question of law on the facts stated and must be answered in the affirmative.

As regards the first question it seems to me equally clear that Section 25-A does not of necessity demand a partition by metes and bounds. According to that section if the Income Tax Officer, after making such enquiries as he may think fit, is satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or groups of members in definite portions, he should record an order to that effect. It is clear, therefore, to my mind that as contemplated by the Act there should be firstly a finding by the Income Tax Commissioner that

the Hindu joint family as such has disrupted and secondly a finding that the joint family property has been divided among the various members or groups of members in definite portions.

The dispute in the case centres on the meaning to be attached to the words 'partitioned in definite portions'. The Income Tax Commissioner appears to hold that this implies a partition by metes and bounds. He has cited a ruling, *Ghanshyam Das Ram Kumar* v. *Commissioner of Income Tax, Bihar and Orissa* [6 I. T. C. 198; 1933 I. T. R. 215] but with due respect to the Commissioner the point arising in the present case did not arise in that case at all. There was a finding of fact there that in spite of the evidence produced no separation had taken place among the members of the Hindu joint family. That would be a question of fact and it was open to the Income Tax Commissioner to so decide on the evidence led before him. The question here is a totally different one, namely, whether granting that there has been a separation of the members of the family, has such a partition been carried out among them as would bring the case within the purview of Section 25-A. According to the learned Commissioner unless there is a partition by metes and bounds no disruption of the family as such and subsequent assignment of shares would bring the case within the terms of the section. It seems to me that this view is not correct. The section itself shows that the property may be partitioned not only among individual members but among groups of members. In other words, it recognises co-ownership and does not hold that a Hindu joint family must split into its individual components before it can be said that the family has partitioned its property within the meaning of the section. It is difficult indeed to see why a Hindu joint family should be compelled to split into its individual components and then reunite again before the terms of the section could be satisfied when it is admitted that the Income Tax Act recognises other co-owners of property. Secondly, one of the properties owned by a Hindu joint family, as is well known, may be a trading business as in this case. It is difficult to see how this business could be partitioned by metes and bounds or that anything more could be done to it except to ascertain the shares. No particular object could be served by demanding partition by metes and

bounds in a business, for all that would be necessary would be to make a book entry separating the capital and separating the outstandings of the firm and then make another entry reuniting the capital and reunting the outstandings of the firm. I do not see what object would be served by this and it seems to me clear that in the case of a business at any rate the only reasonable meaning of the words 'partitioned in definite portions' must be 'partitioned in definite shares'. The dictionary gives the words 'share' as a synonym for 'portion' and similarly it gives 'portion' as a synonym for the word 'share'. I am not able to see why the word should not take its natural meaning rather than the somewhat forced meaning that partition in definite portions means a partition by metes and bounds.

It is not sufficient for the purposes of Section 25-A that a mere disruption of the Hindu family should be proved. There must also be, whether by consent or otherwise, a definite ascertainment of the shares of the different members composing the Hindu family. It is obvious that there may be three stages in a partition of a Hindu family: firstly, there may be a disruption without ascertainment of shares, *i.e.*, the shares may be actually disputed between the various members; secondly, that there may be a separation or a disruption of the Hindu family and the shares may not be disputed and may be ascertained by consent, or after dispute they may be ascertainment otherwise, *e.g.*, by a decree of a Court; and thirdly, that there may be a separation of the family and a partition of the joint property by metes and bounds between the various members. In the last case the property is separately owned and separately possessed by the various members. In the second case the property is separately owned and the shares are ascertained but they may be jointly possessed by the different members, who are no longer joint tenants but tenants in common of the property. Such a partition would however in my opinion satisfy the requirements of Section 25-A of the Income Tax Act.

I would, therefore, answer the first question in the negative. As the parties have partially succeeded I would leave them to bear their own costs.

JAI LAL, J.—I agree with the Judgment just pronounced by my learned brother.

SKEMP, J.—I agree. *Reference answered accordingly.*

[In The Lahore High Court].

LALA HAR KISHEN DAS

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Jai Lal and Skemp, JJ.

October 11, 1934.

Income Tax—Reference—Application to State Case—Limitation—Sixty Days From Service of Notice—Meaning of 'Service of Notice'—Indian Income Tax Act (XI of 1922), Section 66 (2).

The words 'served with notice' in Section 66 (2) of the Indian Income Tax Act (which provides that within sixty days of the date on which he is served with notice of an order under Section 31 or Section 32 the assessee may by application require the Commissioner to refer to the High Court any question of law arising from such order or decision) do not mean served with a written notice of such order or served with a copy of the detailed order giving reasons. There is service of notice within the meaning of the said section if the order or decision was announced in Court in the presence of the assessee or his representative.

Ramanatha Reddiar *v.* Commissioner of Income Tax, Burma [1928] (I.L.R. 6 Rang. 175; 110 I.C. 601; A.I.R. 1928 Rang. 152; 3 I.T.C. 10) *commented upon.*

Petition under Section 66 (3) of the Indian Income Tax Act praying the High Court to require the Commissioner of Income Tax, Punjab and N.W.F.P. to state a case to the High Court. (Petition No. 480 of 1933).

Ram Lal Anand II, for the assessee.

J. N. Aggarwal, for the Crown.

Skemp, J.—This is an application under Section 66, sub-Section 3 of the Indian Income Tax Act asking us to require the Commissioner to state a case on a point of law for the decision of the High Court. The facts out of which the application has arisen are as follows:

The petitioner was assessed to income tax. He appealed to the Assistant Commissioner who accepted the appeal but held

nevertheless that the assessee was liable to income tax. The petitioner then moved the Commissioner of Income Tax on the ground that the Assistant Commissioner had erred in law. The Commissioner rejected this as barred by time. He said that the application was made after a lapse of four months and eighteen days from the date of the appellate order.

The petitioner through his counsel Mr. Ram Lal Anand contends before us that this order of the Commissioner is wrong. The argument is that Section 66, sub-Section 2, of the Income Tax Act lays down that the assessee may require the Commissioner to refer a question of law to the High Court "within sixty days of the date on which he is served with notice of an order under Section 31 or Section 32." He contends that he was not served with notice of the order, *i.e.*, that he was not given a written copy of the Assistant Commissioner's order. The Assistant Commissioner's order, however, makes it clear that the petitioner's *mukhtar-i-am* was present and heard and that the order was announced to him. The question is whether this procedure amounts to serving the petitioner with notice of the order. Notice to the *mukhtar-i-am* is of course as good as notice to the petitioner.

In support of his argument that a written notice is necessary Mr. Ram Lal Anand referred to a ruling reported as *Ramanatha Reddiar* v. *Commissioner of Income Tax, Burma* (I.L.R. 6 Rangoon 175). This was under the previous Act which only allowed a period of thirty days from the date of the order and said nothing about a copy. The order was announced on the 27th of May, 1926, and the appeal was lodged on the 3rd of July, 1926. The Judges allowed the applicant to add the period required for obtaining copies, which brought the application within time. In doing so they made certain observations which were not necessary for the decision of the appeal. In my opinion the words "served with notice of an order" do not mean "served with a written notice" or "served with a copy of the detailed order giving reasons." It is sufficient if the appellant or his representative is given notice of the order in Court.

For these reasons, I would reject the petition with costs.

JAI LAL, J.—I agree.

Application rejected

[In The Bombay High Court].

NARAYAN ATMARAM PATKAR

v.

COMMISSIONER OF INCOME TAX, BOMBAY.

Beaumont, C. J., and Mirza, J.

March 7, 1934.

Income Tax—Reference—Practice—Duty of Assessee to Formulate Questions—Power of High Court to Go Outside Question Framed by Parties—Method of Accounting Insufficient—Assessment Under Proviso to Section 13—Reference, Competency of—Indian Income Tax Act (XI of 1922), Sections 13 and 66 (3).

The proper course for the assessee to adopt when he desires the Commissioner to refer a question of law to the High Court is to formulate the question which he desires to have so referred.

It is open to the High Court on an application under Section 66 (3) of the Indian Income Tax Act to direct the Commissioner to refer some question other than that which the parties have formulated, but generally, the High Court should be slow to go outside the question which the parties have themselves asked the Commissioner to state.

Where the income tax authorities are of opinion that no regular method of accounting has been employed by the assessee or that the method employed is such that the income, profits and gains could not properly be deduced therefrom, this is a decision on a question of fact binding on the High Court. The only question that can arise in such a case is whether the method adopted by the income tax officer of assessing the assessee was a legal method, and, though it can be shown that the income tax officer has proceeded on a wrong basis of law, yet it cannot be laid down that in every case where an income tax officer proceeds under the proviso to Section 13 a question of law arises as to whether the assessment is legal or not.

Where the income tax officer, having found that the books of the assessee, who was a money-lender, were not such as to enable the income to be deduced therefrom, took the capital as shown in the books and, after making a deduction for capital alleged to have been lost, charged the assessee what he considered

a fair rate of interest: Held *that the method adopted was a proper one and no question of law arose upon which the Commissioner could be required to state a case to the High Court.*

Civil Application No. 696 of 1933.

C. H. Carden Noad and *T. N. Walawalkar*, for the applicant.

Jamshed Kanga and *C. M. Eastley*, for the respondent.

BEAUMONT, C.J.—This is a petition asking us to direct the Commissioner of Income Tax to submit a question of law for the decision of this Court under sub-Section (3) of Section 66, Income Tax Act. The parties in this case have not followed the correct procedure under sub-Section (2) of Section 66. That section empowers the assessee to require the Commissioner to refer to the High Court any question of law arising out of the order of the Assistant Commissioner, and the Commissioner is then directed to draw up a statement of the case and refer it with his opinion thereon to the High Court. Then sub-Section (3) provides that if the Commissioner refuses to state a case on the ground that no question of law arises the assessee may apply to the High Court and the High Court if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state a case and to refer it. In our opinion the proper course for the parties to adopt when they desire the Commissioner to refer a question of law to the Court is to formulate the question which they desire to have so referred. In the present case the only question which was formulated before the Commissioner was a question which the parties do not in fact desire to raise and in the petition to this Court no attempt is made to formulate the question which it is desired we should direct the Commissioner to raise.

The petition is framed on the basis of a petition of appeal alleging that the Commissioner has committed various errors of law. It is, I think clearly open to this Court on an application under sub-Section (3) of Section 66, to direct the Commissioner to refer some question other than that which the parties have formulated. But generally I think the Court should be slow to go outside the question which the parties have themselves asked the Commissioner to state. In the present case the question

which counsel for the applicant says that he desires to raise is whether the Income Tax Officer was justified in computing the income on a basis determined under Section 13 of the Act, and if so, whether the basis adopted was legal. Now, Section 13 provides that the income shall be computed in accordance with the method of accounting regularly employed by the assessee. Then there is a proviso that if no method of accounting has been regularly employed or if the method employed is such that in the opinion of the Income Tax Officer the income, profits and gains cannot properly be deduced therefrom, the computation shall be made upon such basis and in such manner as the Income Tax Officer may determine. It is, in our opinion, clear from the order of the Income Tax Officer and the order of the Assistant Commissioner on appeal, that both those officers were of opinion that no regular method of accounting had been employed and the method which was employed was such that the income, profits and gains could not properly be deduced therefrom. That is a decision upon a question of fact by which we are bound. That being so the only question which can arise is whether the method adopted by the Income Tax Officer of assessing the assessee was a legal method. No doubt, where the Income Tax Officer makes the best assessment he can under the proviso to Section 13, it may be shown that he has proceeded on a wrong basis of law, but I am not prepared to say that in every case where the Income Tax Officer proceeds under that proviso a question of law arises as to whether his assessment is legal or not. Here the Income Tax Officer, having found that the books of the assessee, who is a money-lender, were not such as to enable the income to be deduced therefrom, took the capital as shown in the books subject to a deduction in respect of part of that capital which the assessee alleged to have been lost, and on that balance of capital the Income Tax Officer charged the assessee what he considered a fair rate of interest. That seems a proper method and we do not see that any question of law arises which should be referred to the Court. We discharge the rule with costs to be taxed on the original side scale by the Taxing Master.

Rule discharged.

[IN THE LAHORE HIGH COURT].

SONARAM NIHALCHAND

v.

COMMISSIONER OF INCOME TAX, PUNJAB & N. W. F. P.

Jailal and Skemp, JJ.

October 11, 1934.

INCOME TAX—REMITTANCES FROM FOREIGN BRANCHES—REFUSAL TO PRODUCE ACCOUNT BOOKS—PRESUMPTION THAT REMITTANCES WERE OUT OF PROFITS—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4 (2).

The assessee carried on business at Peshawar. In 1929 he began to do business at Kabul which is outside British India. In the assessment for the year 1933-34 the assessee refused to produce the accounts of the Kabul business. The accounts of Peshawar showed that there were remittances from Kabul to Peshawar and from Peshawar to Kabul but there was no evidence to show that the Kabul business made any profits or that the remittances were made out of profits. It appeared further that the receipts of money and goods from Kabul at Peshawar were less than the remittances of money and goods from Peshawar to Kabul. The Income Tax Officer assessed the assessee at Rs. 20,000, assuming that he had made so much profit during the three years ending with 1933-34, and the Commissioner was of opinion that, as the assessee had failed to produce his books, the Income Tax Officer was entitled to assume that the remittances were made out of profits and to assess accordingly;

Held, *on a reference by the Commissioner, that under the circumstances it was open to the income-tax authorities to assume that the remittances were made out of profits, and that the assessment made was not illegal.*

It is not open to the High Court in a reference by the Commissioner either to require him to submit other questions or to formulate other questions and to answer them.

Under the Rules framed by the Lahore High Court it is the duty of the Commissioner if he receives an objection from the assessee to the question framed by him for reference and if he is

not willing to accede to the prayer for modification, to give notice to the assessee that he is not prepared to modify so as to give the assessee an opportunity to move the High Court.

P. L. S. K. R. Firm *v.* Commissioner of Income Tax (5 I. T. C. 55) *relied on.*

Radhakishen & Sons *v.* Commissioner of Income Tax (3 I. T. C. 73) *referred to.*

Case stated by the Commissioner of Income Tax, Punjab and N. W. F. P. under Section 66 (2) of the Indian Income Tax Act XI of 1922 (Reference No. 25 of 1934).

The facts are stated in the judgment of Jailal, J.

Kirpa Ram Bajaj, for the assessees.

Jagan Nath Aggarwal for the Commissioner.

Jailal, J.—This is a reference under Section 66 (2) of the Indian Income Tax Act made by the Commissioner of Income Tax, Punjab, N. W. F. and Delhi Provinces. The following question has been referred for our opinion :

" Whether there was any material upon which the Income Tax Officer could find that Rs. 20,000 comprising income, profits or gains arising at the assessee's Kabul branch (without British India) in the account period or within three years thereof, was remitted to the assessee at Peshawar in British India, during the account period of 1932-33, and taxable under Section 4 (2) of the Act ? ".

At the commencement of the hearing, counsel for the assessee contended that the Commissioner should have referred to this Court other questions which the assessee wanted him to refer, and, secondly, that the question on which reference has been made has been not properly framed. He in fact contended that the question should not be decided by us.

The facts are these: the assessee carries on business in Peshawar ; and since 1929 he is also carrying on business in Kabul. Kabul is outside British India and any profits made from business outside British India become assessable when they are brought in British India. During the year 1933-34 the assessee was assessed at Rs. 20,000 assumed profits of his business in Kabul which he brought in British India during the

three years ending with 1933-34. The assessee objected to this mainly on the ground that there was no evidence that the amount brought by him in British India represented profits from business made in Kabul. In the return of his income, which he filed in pursuance of a notice given by the Income Tax Officer, he made no mention of the business in Kabul or the accounts thereof. He was then asked to produce his books for the inspection of the income tax authorities under Section 22 (4) of the Indian Income Tax Act. He did not produce the books relating to the Kabul business. Time was given to him to produce these books, still he failed or refused to produce them. There is no question that the books relating to the business at Peshawar were produced and assessment was made on the profits of the Peshawar shop according to those books.

The dispute before us is about the profits alleged to have been brought in British India from Kabul. The Commissioner is of opinion that, in spite of the fact that the receipts of money and goods from Kabul to Peshawar were less than the remittances of money and goods from Peshawar to Kabul, as the assessee failed to produce his books the Income Tax Officer was entitled to assume that he had been making profits in the business there and also that the amounts sent by him from Kabul to Peshawar represented profits and not necessarily capital alone.

On these facts the question that we are expected to decide is whether there was any material upon which the Income Tax Officer could find that Rs. 20,000 comprising income, profits or gains arising at the assessee's Kabul branch was remitted to the assessee at Peshawar during the account period. It would be observed that it is not the case of the Commissioner that as a result of the calculations made of the remittances from and to Kabul it is proved that the assessee made a profit in the Kabul business. The assessing authority has made an assumption of this from the fact that the assessee had been carrying on business since 1929, and in spite of several opportunities having been given to him, has failed to produce his account books. He has also inferred that, assuming that the business in Kabul has been run on profit, the amount remitted to Peshawar represented profit also and that it was not wholly capital. In

P.L.S.K.R. Firm v. *Commissioner of Income Tax* [5 I.T.C. 55] it was held that under certain circumstances it is open to the Income Tax Officer to assume that the amount remitted to British India from a branch of the business outside British India represented profits made in such branch in spite of the fact that the total amount of such remittances is less than what has been sent from British India to such branch.

So far as the total of remittances from Peshawar to Kabul and from Kabul to Peshawar are concerned they have been taken by the Income Tax Officer from the books of the assessee kept in Peshawar. There is, therefore, evidence on which the presumption made by the Income Tax Officer has been based and in my opinion he was entitled to make this assumption under the circumstances of the case and on the authority of the case cited above.

Now, with regard to the other questions which counsel for the assessee has asked us to decide and which are not referred to us by the Commissioner, it was held by a Division Bench of this Court in *Radhakishen and Sons* v. *Commissioner of Income Tax* (3 I.T.C. 73) that it is not open to this Court on a reference by the Commissioner either to require him to submit other questions for decision by this Court or to formulate other questions and to answer them. In my opinion we ought to follow this authority which, it may be remarked, is supported by sub-section (3) of Section 66 of the Indian Income Tax Act. This section affords a remedy to an assessee whose application to refer the case, which, in my opinion, includes a part of the case, to this Court, is refused. I may incidentally remark that most of the questions framed by the assessee, which he asks us to decide on this reference, are really covered by the main question which has been submitted to us by the Commissioner. There is, however, one question which does not appear to be covered by this main question; it is question No. 4, whether a notice under Section 22 (4) was not necessary for the production of Kabul accounts when the income-tax authorities did not rely on the return of the income filed by the assessee. This question, in my opinion, is not directly connected with and does not arise out of the question referred to us and it is not open to us to decide it in these proceedings.

A question was raised by the Counsel before us that the Commissioner of Income Tax did not comply with the provisions of Rules 11 and 12 framed by this Court. These rules provide that before making a reference to this Court the Commissioner shall frame a statement of the case and shall send a copy of the same to the assessee and if the assessee raises any objection and there is a difference of opinion between the Commissioner and the assessee, then either party can move this Court, after giving notice to the other party, to decide the matter in difference. It is doubtful whether these rules really relate to a difference as to the legal questions which arise or do not arise in the case. In any case, the assessee had ample notice that a reference had been made to this Court by the Commissioner in the form originally proposed by him and he has made no application in writing to us to decide the question under Rule 12. About the end of his arguments the learned counsel did ask us to take action under Rule 12, but, in my opinion, it is not open to us on an oral application made at this stage, and at least it would be undesirable in this case, to direct the Commissioner to make a modified statement of the case to this Court. Still it appears that it was the duty of the Commissioner on receipt of objections by the assessee to notify to the latter that he was not prepared to accede to his prayer to modify the proposed reference to this Court. The assessee then could have moved this Court long before the reference came up for hearing.

In my opinion, therefore, the answer to the question submitted by the Commissioner to this Court should be in the affirmative, and I would decline to answer any other questions that the assessee asks us to answer. But in view of the fact that the Commissioner did not comply with the strict provisions of the rules framed by this Court, I would leave the parties to bear their own costs of this reference.

SKEMP, J.—I agree.

Reference answered accordingly.

[In The King's Bench Division.]

LAMBE v. INLAND REVENUE COMMISSIONERS.

Finlay, J.

July 24, 25, 1933.

Income Tax—Surtax—Interest on Loan not Assessable Until Paid—Conditional Assessment—Finance Act, 1927 (17 & 18 Geo. 5, c. 10), Section 39, Sub-section 2.

A taxpayer was assessed to surtax in respect of a sum due to him as interest on a loan. The interest had not been paid and it was doubtful whether it ever would be paid. The taxpayer appealed to the Special Commissioners, who confirmed the assessment, stating in their finding that they had satisfied themselves that the duty would not be collected unless and until the interest was in fact received by the taxpayer—Held, *first, that it was not open to the Commissioners to make or to confirm an assessment to surtax subject to the condition that the duty should not be collected unless and until a particular event occurred. The appellate jurisdiction of the Special Commissioners is confined to confirming, discharging or modifying an assessment. Secondly, that the taxpayer was not assessable to surtax in respect of this source of income until it was actually received by him.*

Cases referred to:

Greenwood v. Smidth & Co. [1922] (91 L. J. K. B. 349; [1922] 1 A.C. 417: 8 Tax Cas. 193).

Grey v. Tiley [1932] (16 Tax Cas. 414).

Hawley v. Inland Revenue Commissioners [1925] (134 L. T. 502; 9 Tax Cas. 331).

Inland Revenue Commissioners v. Blott [1921] (90 L. J. K. B. 1028; [1921] 2 A.C. 171; 8 Tax Cas. 101).

Inland Revenue Commissioners v. Haddington (Earl) ([1924] S. C. 456; 8 Tax Cas. 711).

Leigh v. Inland Revenue Commissioners [1927] (96 L. J. K. B. 853; [1928] 1 K. B. 73; 11 Tax Cas. 590).

St. Lucia Usines and Estates Co. v. St. Lucia (Colonial Treasurer) [1924] (93 L. J. P. C. 212; [1924] A. C. 508).

SIMPSON v. MAURICE'S EXECUTORS [1929] (45 T.L.R. 581; 14 Tax Cas. 580).

Special Case stated by the Special Commissioners of Income Tax.

At a meeting of the Special Commissioners held on June 3, 1932, Lieut.-Commander C. E. Lambe, R. N., appealed against an assessment to surtax in the sum of £ 9,025 for the year ending April 5, 1931.

In computing the appellant's total income from all sources, for the purposes of surtax for the year, there was included a sum of £ 491 11s., representing interest due to the appellant from Messrs. North & Rose for that year, upon a sum of £ 7,500 advanced by the appellant to them.

The appellant is the life tenant of an estate in Cornwall, which comprises a number of China clay works, one of which known as "Rocks," was leased by him to North & Rose for a term expiring on September 29, 1942.

The appellant advanced to them, upon the security of a mortgage of the works, sums totalling £ 7,500. The advances were made on various dates between April, 1926, and November, 1929, and bore interest at the rate of 6 per cent. per annum minimum, fluctuating with the price of China clay. The interest was duly paid until September, 1929, since which date no payments, either of principal or of interest, had been made. For the year ending March 31, 1931, interest to the extent of £ 491, 11s. was due and owing to the appellant.

In February, 1931, North & Rose were in financial difficulties, and the appellant appointed a receiver. In March, 1931, North & Rose called a meeting of their creditors, and on March 24, 1931, a receiver and manager was appointed by the Court. The receiver and manager has carried on the business ever since.

The appellant had not received the £ 491 11s., and it was stated to the Special Commissioners that it was doubtful whether he ever would receive it, although he had not waived his right to do so.

The Special Commissioners, whose duty it was to make the assessment under appeal, were of opinion that the £ 491 11s.

being payable in the year ending April 5, 1931, should be included in the computation of the appellant's total income from all sources for the year. They informed the appellant, however, that the tax on the sum would not be collected until the £ 491 11s. was in fact received by the appellant.

The Special Commissioners who heard the appeal were not satisfied on the evidence produced before them that the sum would never be paid to the appellant, and held that it was rightly included in the assessment. They therefore confirmed the assessment, stating in their finding that they had satisfied themselves that the tax would not be collected from the appellant unless and until he had received the sum.

It was contended for the appellant that the sum in question ought not to be included in the computation of his income; that the case was covered by the decision in *Leigh* v. *Inland Revenue Commissioners*, and that in the case of interest there can be no "receivability" without "receipt."

The Crown contended that mere delay in payment of the sum would not justify its exclusion from the computation of the appellant's income for that year. If the law were as contended for by the appellant before 1927, it had been altered by Section 39, sub-Section 2, of the Finance Act of that year.[1]

Bowe, for the appellant.

The Solicitor-General (*Sir Boyd Merriman, K. C.*), and *Reginald Hills*, for the Crown.

FINLAY, J.—This is rather a curious case, and I suppose as to the principle which it raises is one of some importance. [His Lordship stated the facts, and continued:] The Commissioners find that the appellant has not received the said sum of £ 491 11s. and they add that it was stated before them that it was doubtful whether he ever would receive it. They were of opinion

(1) Finance Act, 1927 (17 & 18 Geo 5, c. 10). Section 39, sub-section 2: "In estimating under the Income Tax Acts the total income of any person, any income which is chargeable with income tax by way of deduction at the standard rate in force for any year shall be deemed to be income of that year, and any deductions which are allowable on account of sums payable under deduction of income tax at the standard rate in force for any year out of the property or profits of that person shall be allowed as deductions in respect of that year, notwithstanding that the income or sums, as the case may be, accrued or will accrue in whole or in part before or after that year."

that that sum, being payable in the year ending April 5, 1931, should be included in the computation of the appellant's total income from all sources for that year. They informed the appellant, however, that the duty on the said sum would not be collected until it was actually received. The matter then came before the special Commissioners sitting in their other capacity, that is, as an appellate tribunal, and naturally in the ordinary course before different Special Commissioners, and they arrived at this conclusion. They said: "We were not satisfied on the evidence produced before us that the said sum of £491 11s. would never be paid to the appellant, and we held that that sum was correctly included in the computation of the appellant's total income. We therefore confirmed the assessment, having satisfied ourselves that the duty on the said sum of £491 11s. would not be collected from the appellant unless and until it was in fact received by him."

Now that raises a rather curious state of affairs. It is quite clear that an assessment to surtax, once made and confirmed, constitutes a debt due to the Crown. What the Special Commissioners here have done is to confirm the assessment, but they say that before they confirmed it they satisfied themselves that "the duty on the said sum of £491 11s. would not be collected unless and until it was in fact received by him".

I am of course perfectly satisfied, knowing the Special Commissioners as I do, that they did satisfy themselves that the sum would not be collected. I am also satisfied that any officials connected with the collection of the tax would loyally abide by the directions which had been given by the Special Commissioner. But, having said that, I must add that I think this procedure is exceedingly unsatisfactory. The general position is that an assessment is made; that it is either confirmed or it is discharged or it is modified; but there emerges, if the assessment is confirmed to any extent, a sum which is due and exigible from the subject who has been assessed. I know of no provision, and my attention has not been called to any provision, in the Acts which authorises the making of what one may, I suppose, not inappropriately call a contingent assessment; that is to say, an assessment which says: "We assess you on £491 11s. but

having assessed you, we tell you that you need not pay unless and until you receive that sum of £491 11s."

My attention was called to an observation—it was only, I think, a passing observation—of ROWLATT, J., in a case where he referred to the possibility of some such arrangement being made—see *Leigh* v. *Inland Revenue Commissioners*. That the arrangement, having been made, would in this or in any other case be honourably observed I do not for one moment doubt, but I must repeat for myself that I cannot think that this is a satisfactory method of disposing of an appeal. If the Legislature thought fit to give authority to make assessments in this contingent form, they could of course do so, but until that is done I do for myself feel that an assessment must be a definite thing, and that the Special Commissioners, if they are appealed to, must either confirm the assessment, or modify it, or discharge it; but they cannot, as they have done here confirm it, saying that they have, before doing so, and I suppose as a condition of doing so, satisfied themselves that unless and until a particular event takes place it will not be enforced. I have thought it right to make these observations upon what has taken place in this case, because no doubt the matter is one of some general importance.

I now come to the point in the case, treating the Special Commissioners, as I think I clearly must treat them, as having confirmed the assessment which was made, and the point now is whether that assessment was correctly confirmed. The position is, as is found in the Case, and I do not think there can be the slightest doubt about it, that North & Rose had defaulted, in the sense that they had failed to pay the interest which was due and owing by them. I accept, as I am bound to accept, the finding of the Commissioners which I think is to the effect that it was not certain whether in the future North & Rose would or would not be able to pay this sum. The Special Commissioners find expressly that they were not prepared to hold that it was certain that they would not be able to pay. I rather gather, though they do not actually say so, that it would have affected their decision if they had been able to find that.

In these circumstances the point raised for my decision is, where there is a sum no doubt due to the appellant by way of

interest, but by reason of the default of the debtor not paid, whether that can come in as a part of the income of the appellant. Certainly one would, looking at the thing quite generally, suppose that income means what comes in and that it refers to what is actually received by the taxpayer. Of course, income may be of various sorts, income under Schedule A, and under the various other Schedules; but none the less the tax is a tax on income. It is a tax on what, in one form or another, goes into a man's pocket. That is the general principle. Now some authority was cited to me—I do not think it is necessary to go into it in detail—and I may refer to, without reading a passage in LORD FINLAY'S speech in *Blott's Case* in the House of Lords where he lays down the general principle of what is income (90 L. J. K. B., at p. 1038; [1921] 2 A. C., at p. 195). My attention was called to a number of authorities in which matters somewhat like this had been considered, and with the exception of one case, *Lord Haddington's Case*, where this point was not argued, although it is implicit in the decision, the cases are all one way on the actual point to be decided here; that actual point being whether, in order to attract tax, you must have income, in the sense of something coming in.

I am not going through the cases in detail, but there was *Leigh's Case*, *Grey* v. *Tiley*, *Simpson* v. *Bonner Maurice's Executors*, and the *St. Lucia Case*. Those decisions I think, fairly looked at, are in agreement upon the general principle which I have been indicating. They do to some extent differ upon a point which no doubt is a difficult point and upon which one may see that there might well be difference, and that point is this: What is the position where there is income receivable, in a number of years, one, two, three, four, five, and nothing is received in years one, two, three or four, but in five the whole of the income for the five years is paid up? That is a difficult question, and it is a question upon which it seems to me, looking at the authorities, opinion may well have to some extent fluctuate as to whether, when that payment is made, it is to be treated as income of year five, in which it was made, or as income of the years one, two, three and four in respect of which, as well as the year five, it was paid. I think that if the authorities are looked at, and particularly the judgment of LAWRENCE,

L. J., in the *Bonner Maurice Case*, it will be seen that the Judges deciding these different cases were none of them suggesting that you could have a tax where there was in fact no income received. They seem to me all to recognise the principle that income must have been received. But then, as I say, there is room for a difference of opinion as to what year it is in respect of which it is assessable. I do not propose to go through the cases. The decision of ROWLATT, J., in *Leigh's Case*, which I think was not questioned, strongly favoured the view which was urged on behalf of the appellant here. I think that *Simpson* v. *Bonner Maurice's Executors*, properly understood, points the same way. The real question at issue in that case was remote from the present. It was whether sums received by German bankers on behalf of the appellant during the war were in fact to be regarded as received by him. That was the actual point in the case. I ought to have mentioned also, to make my references to the cases complete, *Howley's Case*, which was much relied on by the Solicitor-General. But, as far as I can see, it does not really support his view, because it is clear, when that case is investigated that there the income had actually been received.

I do not propose to say any more about the cases. It appears to me clear, both as a matter of construction and on authority, that as the law stood before 1927 this claim by the Crown to assess income which had not been received, and which—I use the word purposely—may never be received, must fail. But it is said that as a result of Section 39, sub-Section 2 of the Finance Act, 1927, a change in the law has been effected. I do not, of course, forget the principle laid down in *Greenwood* v. *Smith & Co.*, and many other cases too, that where there is to be an extension of the area of charge one ought to look for clear words to do it, and one ought, *prima facie*, to find any extension of the area of charge in amendment of the Schedules, which after all are the charging sections of the Act, not forgetting nevertheless that my duty is to construe the section.

Now the general object of Section 39 is perfectly clear. It is a section which is inserted with reference to the substitution of surtax, and there are a number of consequential provisions necessary, and this is one of them.

The first part of Section 39 gets rid of a confusion which had caused much trouble, due to the provisions of Rule 19, which in effect said that on payment of certain sums one had to deduct tax at the rate applicable to the period over which the sums had accrued due. The result, of course, was that a great number of people had to do a troublesome and rather difficult sum, because they might have one rate at one period and another at another, and that difficulty was dealt with by the first sub-Section. But the second sub-section was the one relied on by the Solicitor-General. It is this. [His Lordship read it, and continued :] Now the suggestion of the Crown appears to be that this sub-section has effected a startling change in the law, and that it has brought into the area of assessment sums which had not been received, which never may be, or as far as I can see never will be received. I do not think that that is the effect of the section at all. It is clear that the subsequent words of the sub-section are all governed by the words "any income." After all, a surtax is leviable upon the total income of the taxpayer, and I think that before this sub-section operates one must predicate income and one must predicate deduction, and you cannot deduct if there is nothing from which to deduct. I think the essential condition of the application of the section is that there should be income. There should be income going out by the person paying it, and coming in to the person receiving it, and there should then be deduction from that income. I think that is postulated by the section, and that the scheme now in operation is this: Suppose that you have interest due, as in this case, on a loan; if the thing goes through in the ordinary way, and the interest is paid, there is no difficulty at all; the tax is deducted at the appropriate rate and the income is brought in as part of the income of the recipient. That is what happend during the earlier years in the case of this loan by the appellant. But now suppose that, by reason of the difficulties of the debtor, interest is not paid, there is then, in my opinion, no income. There is nothing to assess. There is nothing from which to deduct, looking at it in one way, and there is nothing to assess, looking at it from the point of view of the recipient. If, unfortunately, the loan is irrecoverable, and if the debtors are never in a position to pay any more, so that it

becomes a dead loss to the appellant, then he will not be liable to any further assessment in respect of it. But now suppose that three years hence the debtors happily become prosperous again and, China clay beginning to pay in Cornwall, they are in a position to pay up, and do pay up, say, in 1936, the interest for that year and also the interest for the five preceding years. Then, as it seems to me, an additional assessment can properly be made upon the appellant, and though made in 1936 the payments will be referred to each of the years in which they were receivable, and the taxpayer will be liable to assessment in respect of each of those years. That, as I read it, is the result of this section.

I have thought it right to make these observations because the matter has been a good deal discussed; but it is really sufficient for the decision of the present case that I should say that, in my opinion, there is nothing in Section 39, sub-Section 2, which induces me to think that a startling change in the law was effected by it, or that, as a result of it, a person is liable to an assessment of surtax in respect of income which he has not received, and indeed may never receive. Of course if that were enacted by clear words one would give effect to it, but I do not so construe the words which have been used. The result is that, in my opinion, on the facts as they are stated the appeal succeeds and must be allowed.

Appeal allowed.

Solicitors—Torr & Co., for the appellant; *Solicitor for Inland Revenue*, for the Crown.

[END OF VOL. II.]

INCOME TAX REPORTS

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